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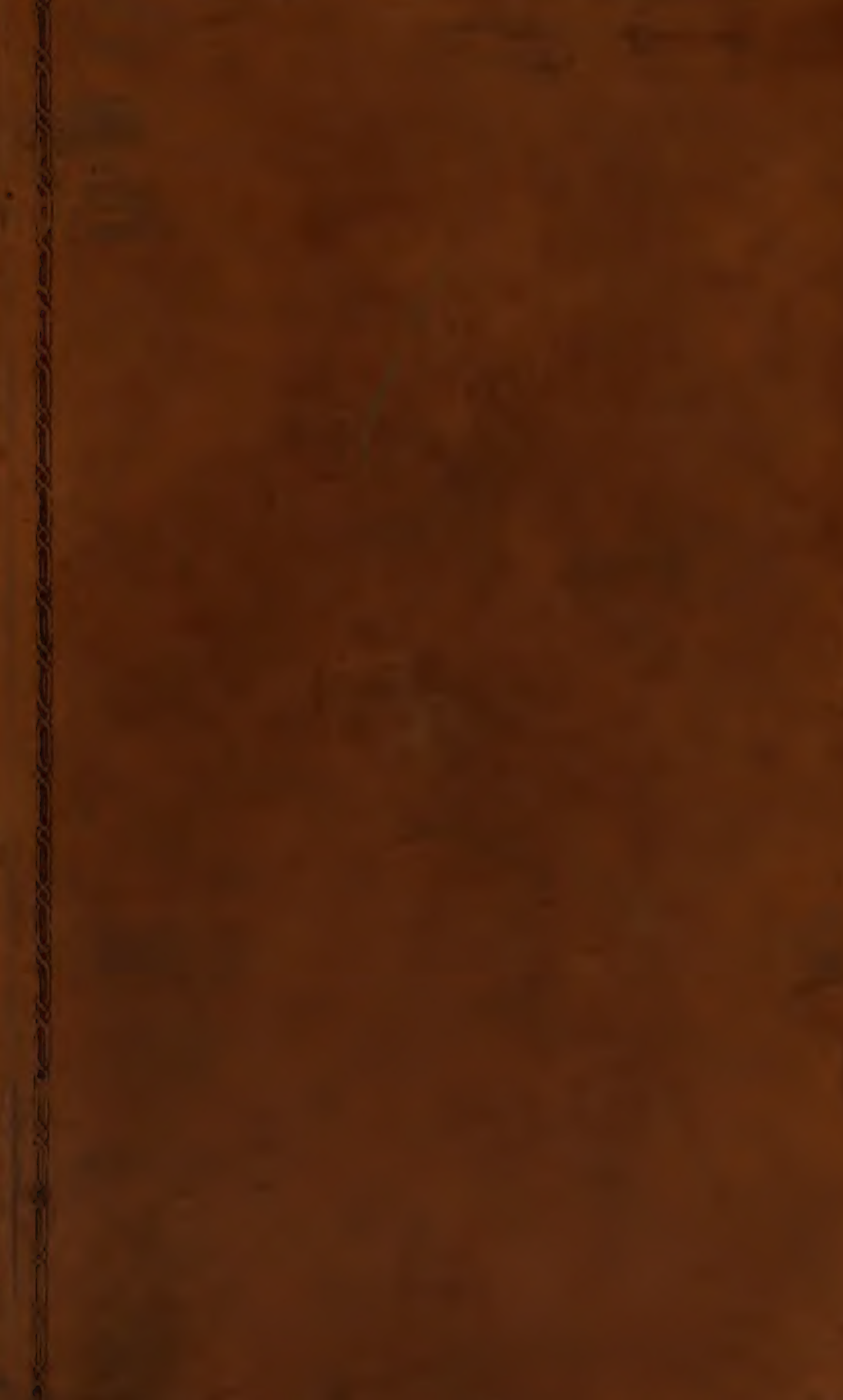
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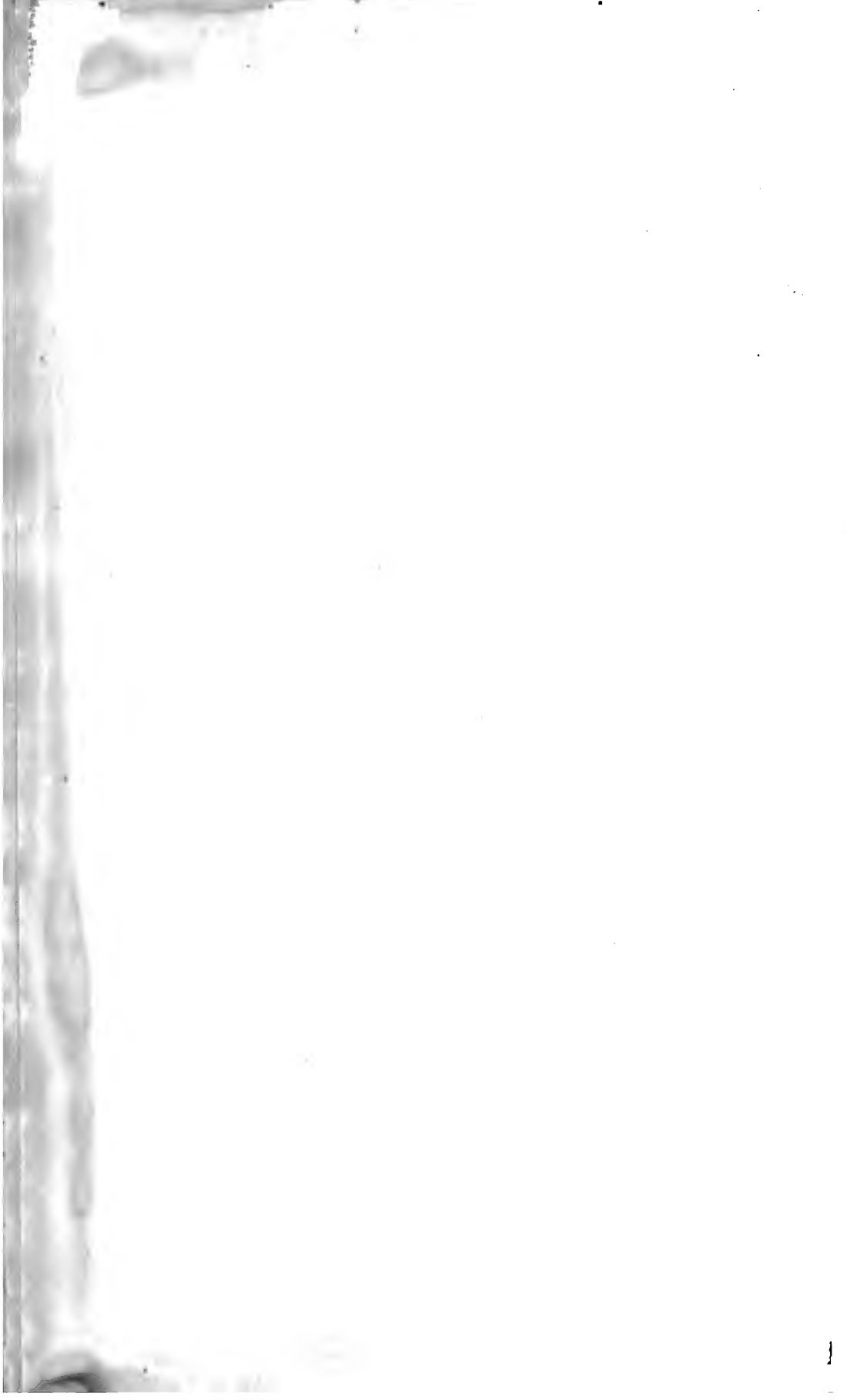




James P. Fennell

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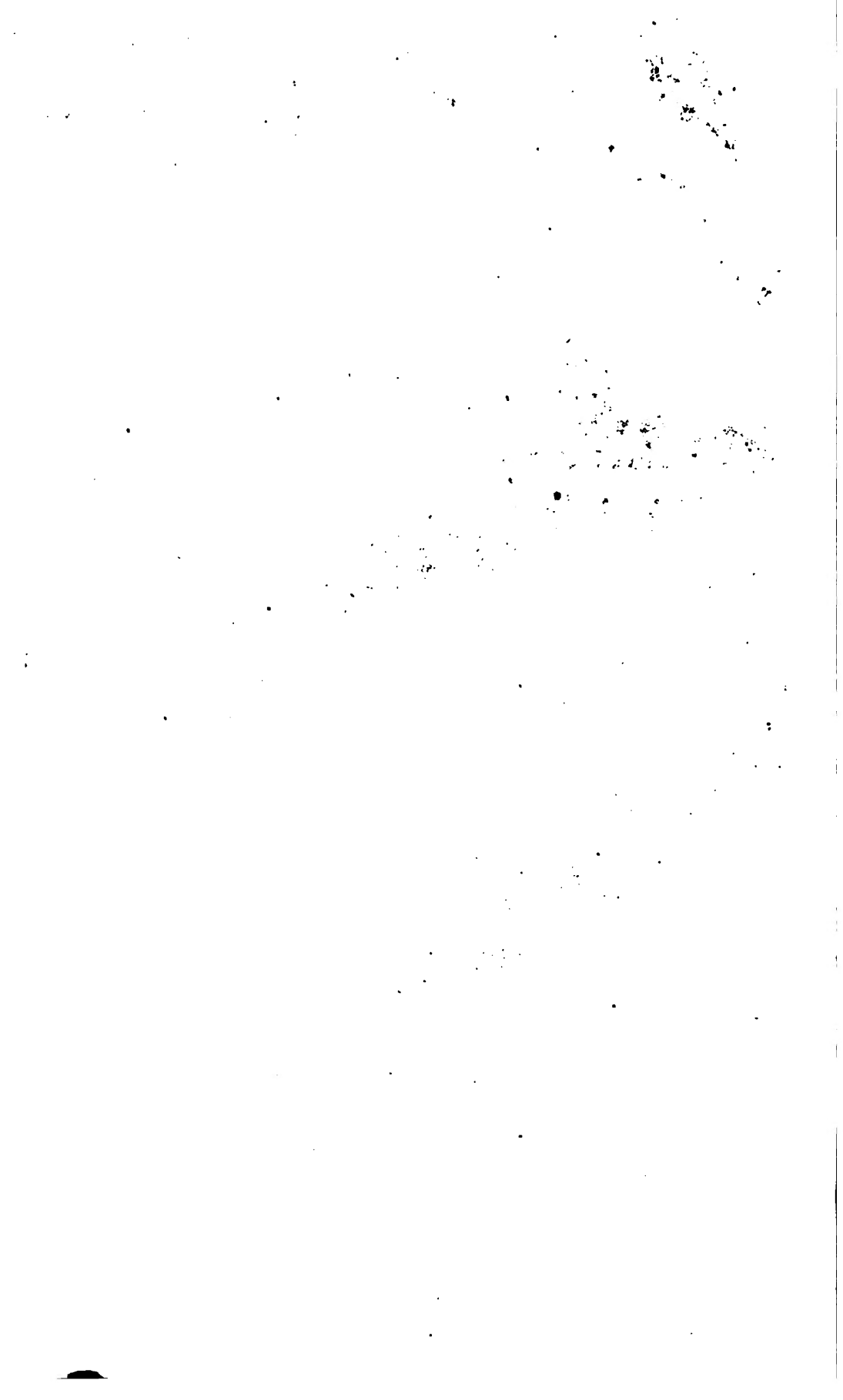
REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
English Courts of Chancery,
WITH
NOTES AND REFERENCES
TO ENGLISH AND AMERICAN DECISIONS.

~~~~~  
By E. FITCH SMITH,  
COUNSELLOR AT LAW.  
~~~~~

VOL XXXI
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NEW YORK:
BANKS, GOULD & CO., 144 NASSAU STREET.
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1852.



REPORTS OF CASES

ADJUDGED IN THE

HIGH COURT OF CHANCERY,

BEFORE THE

RIGHT HON. SIR JAMES WIGRAM, KNT.

VICE-CHANCELLOR.

~~~~~  
BY THOMAS HARE,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.  
~~~~~

WITH NOTES, AND REFERENCES

TO ENGLISH AND AMERICAN DECISIONS.

By E. FITCH SMITH,

COUNSELLOR AT LAW.

1846-1849
VOL. VI.

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1852.

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LORD LANGDALE, *Master of the Rolls.*

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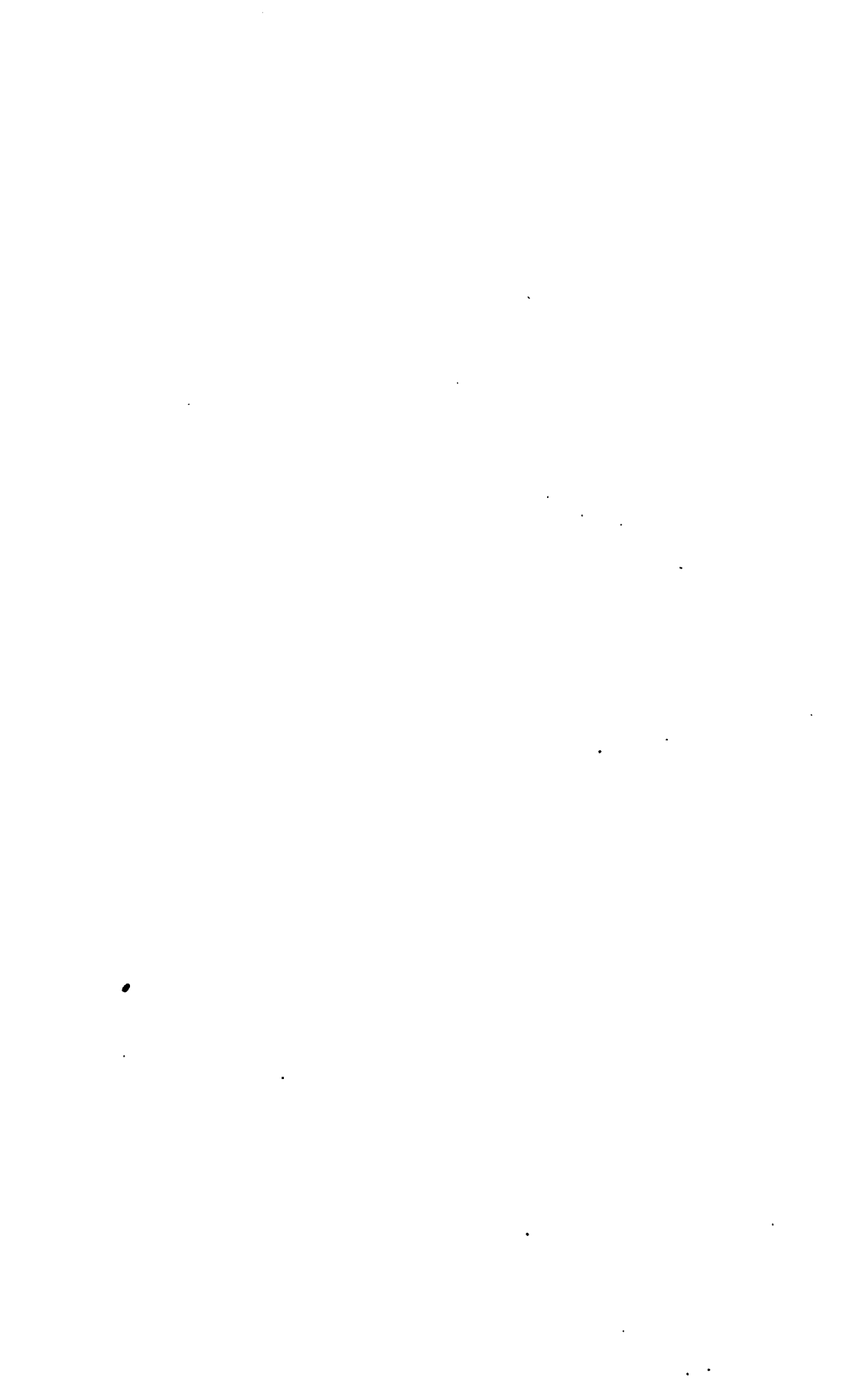
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REPORTS OF CASES
ADJUDGED IN THE
HIGH COURT OF CHANCERY,
BEFORE
THE RIGHT HON. SIR JAMES WIGRAM, KNT.,
VICE-CHANCELLOR.
COMMENCING IN
MICHAELMAS TERM, 10 VICT. 1846.

POTTER v. SANDERS.

1846: July 10th and 11th; Nov. 4th and 5th.

If a vendor contract with two different persons for the sale to each of them of the same estate, the Court will, *prima facie*, enforce the contract which was first made; and if the party with whom the second contract was made should, after notice of the first contract procure a conveyance of the legal estate in pursuance of the second contract, the Court will, in a suit for specific performance by the first purchaser against the vendor and the second purchaser, decree the latter to convey the estate to the plaintiff.

A purchaser offered a price for an estate, and the vendor by a letter sent by post and received by the purchaser the day after it was put into the post-office, accepted the offer:—*Held*, that the vendor was bound by the contract from the time when he posted his letter, although it was not received by the purchaser until the following day.

G. S. SANDERS was seised in fee of three closes of lands, in Byfield, in the county of Worcester, subject to a mortgage of 500*l.*, which he offered to sell at the price of 950*l.*, upon the condition that the purchaser should not require a covenant for the

 1846.—Potter v. Sanders.

production of certain title deeds which Sanders was unable to obtain. Potter, being informed of this offer, wrote to Sanders a letter, dated the 20th of April, 1844, offering 800*l*.
 [*2] *for the land, taking the title as it stood. In reply to this letter, Sanders wrote to Potter as follows :

"*Bewley Mill, Redditch, April 23, 1844.*"

"Sir,—I received your favor this morning, and in reply beg to say that I accept of your offer of 800*l*. for the land at Byfield. I have written to Mr. Gery by this post, who shall let you know when the deeds are ready, which I believe will be in a few days. Will that be convenient to you? Yours, &c.

"G. S. SANDERS."

This letter was put into the post-office on the day of its date. Sanders also wrote to Gery a letter of the same date, as follows:—

"Dear Sir,—I have written to Mr. Potter to say that he shall have the land at Byfield for 800*l*. I have told him that I have no doubt but that you will have the conveyance ready in a few days. Can you do so? As I am short of cash, would you ask him if he would pay me 100*l*. as a deposit, *instantly*? Perhaps it would not inconvenience him, and it would be of great service to me. You could give him a proper receipt, signed by me, and which would make our bargain more firm. I suppose, as Mr. Potter intends to pay off the mortgage, it will be necessary for the mortgagees to sign the deed; and I have no doubt but that one of them will wish to be present at the settling, to receive the 500*l*. and interest. You need not tell Potter as from me, but hint to him, that if he does not complete the purchase without delay, his chance will be gone. Yours, &c.

"G. S. SANDERS."

While this correspondence was going on with Mr. Gery
 [*3] and Potter, Sanders was also in communication *with another party, who was willing to purchase the land. On the 8th of April, S. Gardner as the agent of William Coates, applied to Sanders' father, who lived at Daventry, for the price of the

1846.—Potter v. Sanders.

land, and the father on the same day wrote to Sanders the following letter :—

“Dear George,—My principal reason for writing is to know the lowest price you will take for your land at Byfield. I have had a person to inquire after it to-day. He wishes for an answer immediately; so please to send me word directly on receipt of this. Yours, &c.

“THOMAS SANDERS.”

This communication was answered by a letter from Sanders to his father, dated the 12th of April, 1844, as follows :—

“My dear Father,—Unluckily I did not send for my letters yesterday, so did not have your kind note till this morning. I hope the delay will not be of consequence. My lowest price for the Byfield land is 925*l*.; and I will pay for the conveyance, which will take the 25*l*. I should think the timber on the land is worth 50*l*., and that the purchaser would have into the bargain. I must admit I should be glad to sell it, and will leave it to you to dispose of it, if possible, should the parties offer even a less sum; although I think it ought not to go under the 925*l*. Mr. Gery would be employed to convey, as he has already in his possession a draft of the deed. Yours, &c.

“G. S. SANDERS.”

The father thereupon wrote the following letter, dated the 13th of April, 1844, to Gardner :—

*“I have heard from my son this morning. He is willing to take for his land 950*l*. the timber included, or less, if the timber be valued. I shall be glad to hear from you as soon as convenient.”

On the 23rd of April, Sanders wrote to his father :—

“My dear Father,—Potter has written to offer me 800*l*. for the land at Byfield. Have you heard anything from the party you wrote to me about. Perhaps if the party applying to you has no connection with Potter, he would be induced to give more if he knew that I had received an offer from another party. I received

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Potter's letter this morning, and am now off to market, so have only time to say all are well."

In the morning of the 24th of April, 1844, an interview took place between Gardner and Sanders' father, at the house of the latter, at Daventry, at which the father on behalf of Sanders, agreed (absolutely, as the witnesses deposed) to sell to Gardner, as the agent of Coates, the three closes of land for \$900*l.*; and the timber upon it to be taken at a valuation. Sanders was informed of this contract by the following letter from his father:—

"In reply to yours, received this morning, I have to say, that, if you approve of it, I have sold your land at Byfield for 900*l.*; the timber upon it to be taken at a fair valuation, and the purchaser to pay for the conveyance, and you for the title. The purchaser is acquainted with the title, and will pay for the land at Midsummer or Michaelmas next: which you think proper. I have promised to give an answer on Saturday next, if I can learn from you before that time. I hope you will be pleased with what I have done."

[*5] *The transactions after the 24th of April, 1846, were these:—By a letter dated the 24th of April, but bearing the post-mark of the 26th, Sanders stated to Potter that his father had sold the land before the letter to Potter of the 23d of April was written. Sanders, in reply, was informed by Mr. Gery, in a letter of the 28th of April, that Potter insisted upon his contract, and that he (Mr. Gery) thought there was no alternative for Sanders but to submit to perform it. Sanders, in a letter to Mr. Gery, of the 30th of April, acquiesced in this view, and reiterated his request for the immediate payment of 100*l.* in part of the purchase money. Other communications passed with reference to the performance of the contract and preparation of the conveyance, and, on the 7th of May, Potter paid Sanders 100*l.* in part of his purchase money of 800*l.* On the other hand, Sanders, on the 26th of April, replied to his father's letter of the 24th of April, thus:—

"My dear Father,—I am much pleased with the bargain you

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have made for me. I should wish the purchase to be completed at Midsummer. As Aplin will have to make the conveyance, the title is sure to be correct. Who is the purchaser?"

On the 27th of April, a memorandum of agreement was drawn up in writing, and signed by Sanders' father as the agent of Sanders, and Gardner as the agent of Coates, in the terms of the contract already stated,—with the additional provision that, at Midsummer, the purchase was to be completed and possession given to the purchaser.

At the time of the foregoing transactions neither Coates, nor Gardner his agent, had any notice of the contract which Sanders had made with Potter; but *Gardner received [*6] notice of that contract early in May, and, on the 14th of the same month, formal notice thereof was given to Coates; and Coates and Sanders were informed that Potter insisted upon his right to have the contract performed.

By indentures, dated the 31st of May and the 1st of June, 1844, Sanders and the mortgagees, by his appointment, conveyed the land to Coates, in consideration of the payment by the latter of the purchase money mentioned in the memorandum of agreement of the 27th of April.

The bill was filed by Potter against Sanders and Coates; and it prayed that Sanders might be decreed specifically to perform his contract with Potter for sale of the land, and that Coates might be declared to be a trustee for Potter, and that Coates and Sanders might be decreed to convey the premises to Potter; or if it should appear that Coates had no notice of the contract with Potter before the conveyance, then that an account might be taken of what was due to Potter from Sanders for principal and interest on the 100*l.*, and that Sanders might be ordered to pay the same and the costs of the suit to Potter.

Gardner, who was the agent of Coates, stated in his evidence, that on the 17th of April, 1844, he made an offer for the land to Sanders' father, who promised him the refusal for a week, and that he completed the contract on the 24th of April, on which day the week would expire. At the hearing,

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Mr. Walker and Mr. Stinton, for the plaintiff, cited *Daniels v. Davison*,^(a) *Farmer v. Robinson*.^(b)

[*7] *Mr. Beales, for the defendant Sanders.

Mr. Romilly, and Mr. Fleming, for the defendant Coates.—There is a question whether the contract with Coates was not the prior contract; but the least favorable way of stating his case is,—to say that the equities are equal; and Coates having the legal estate, the Court will not interfere to dispossess him of it. The bill seeks the specific performance of a contract to which Coates is no party. This is contrary to the course of the Court. Why is Coates to be involved in a suit concerning a transaction with which he had nothing to do? *Tasker v. Small*,^(c) *Mole v. Smith*,^(d) *Robertson v. The Great Western Railway Company*,^(e) *Wood v. White*,^(f) *Mason v. Franklin*.^(g) To sustain a suit for specific performance there must be mutuality; but here it is clear that Sanders could not maintain such a suit against Potter. How then can Potter sustain the suit against Sanders? and if he has not the right against Sanders he has not the right against Coates. Suppose a case in which a vendor had fraudulently contracted to sell the same estate to three different persons successively, and conveyed the estate to the third purchaser. The two first purchasers have their legal remedies upon their several contracts, but neither of them can call upon the third purchaser to transfer to him the legal estate. Suppose again a contract with one party who pays his purchase money, but does not obtain a conveyance, and a second contract fraudulently made with another purchaser, who, at the time of his contract, has no notice of the first contract, and afterwards acquires the legal estate. The right of the first purchaser is not to a conveyance of the

[*8] estate to himself as a purchaser, but *only to stand as a mortgagee of the estate for the amount of his purchase

(a) 16 Ves. 249; S. C., 17 Ves. 433.

(b) 2 Campb. 339, n.

(c) 3 Myl. & Cr. 63.

(d) Jac. 490.

(e) 10 Sim. 314.

(f) 4 Myl. & Cr. 460.

(g) 1 Y. & C. C. C. 239.

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money. 5 Bythewood, by Jarman, 3rd ed., p. 445, *Allen v. Anthony*,^(a) *Dawson v. Ellis*.^(b) The circumstance that the contract with Coates was parol only is not material,—for a parol contract is a good defence in equity, although a decree for specific performance could not be made upon it. *Hyde v. Wrench*.^(c) Here was a clear authority to the father to sell the estate, and a contract for sale made under that authority. The Court will not deprive Coates of the legal interest which he has acquired in pursuance of that contract. *Parken v. Whitby*.^(d) was also cited, on the effect to be given to Gardner's deposition.

Nov. 4th.—VICE-CHANCELLOR:—After stating the facts which took place before and on the 24th of April, and the subsequent conveyance to Coates,—

The above facts are I believe sufficient to raise the question at issue between the parties; for I lay out of the case the argument at the bar founded upon the facts deposed to by Gardner, but not suggested in the pleadings, that the defendant's contract of the 24th of April is to be referred to the 17th of April. The answer is most explicit, that the defendant's contract was on the 24th, and upon that issue is joined. Neither the payment of the 100*l.*, which was made after notice of the defendant's agreement, nor the correspondence and communications which took place between the different parties after the 23rd of April, appear to me to affect the question in the cause, except as they clearly show upon whom the costs of this suit ought to fall. On the *27th of April, 1844, the plaintiff received a letter from [*9] defendant Sanders, dated the 24th of April, but having the post-office mark of the 26th,—and which cannot by any possibility be correctly dated, in which he says—not very candidly,—that when his letter of the 23rd was written, his father had made the contract with Coates. Sanders was soon afterwards informed by a letter from Mr. Gery, that the plaintiff insisted upon the performance of the contract; and from that time he apparently

(a) 1 Mer. 282.

(b) 1 J. & W. 524.

(c) 3 Beav. 334.

(d) Turn. & Russ. 366.

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considered the plaintiff entitled to the benefit of his contract. He desired Gery to proceed with the conveyance, suggested that a formal agreement in writing be prepared to make the matter safe; and on the 7th of May received from the plaintiff 100*l.* on account of his purchase. However, on or soon after the 14th of May, his views were altered, and he appears then to have considered the defendant Coates entitled to a performance of the contract entered into on his behalf. None of these matters, however fertile they may have been as topics for observation upon conduct, appear to me to affect the dry legal questions to which I am bound to confine myself.

The first question is, whether the plaintiff's contract has not priority, in point of time, over the verbal contract made with Coates on the 24th of April. If that question be answered in the affirmative, it will dispose of the whole case. For the property comprised in the contract would cease to belong to the vendor from the moment that contract was concluded; and I am quite clear (in the circumstances which I have detailed) that Coates can derive no advantage from the conveyance of the legal estate, taken after notice of the plaintiff's agreement for purchase, and whilst his own position was unaltered by payment [*10] of purchase money, *or otherwise, under an agreement which, if the plaintiff's contract had priority, would be void from the beginning.

For the purpose of answering the question, whether the plaintiff's contract had priority, I was at one moment inclined to direct an inquiry (the answer to which I felt certain I might anticipate,) at what hour of the 24th of April the letter of the 23rd was delivered at the plaintiff's residence in the regular course of post. I cannot doubt that it would be delivered before the verbal contract with Coates was made; and if so, that would decide the case. But, upon further consideration, I think it unnecessary to direct that inquiry. The delivery of the letter on the 24th was merely the completion of an act by which the vendor had bound himself on the 23rd. If the vendor had died on the 23rd, after posting the letter of that date, I can scarcely entertain a doubt but that the plaintiff would in this Court have

1846.—Potter v. Sanders.

been the owner of the estate, as against the heir of the vendor. But without carrying the point further, I think the vendor, when he put into the post-office the letter to the plaintiff, of the 23rd of April, did an act, which, unless it were interrupted in its progress, concluded the contract between himself and the plaintiff.[1] I cannot, in short, doubt but that the letter of the 23rd was a revocation of the authority which the vendor had given to his father, to make a contract for him for the sale of the estate. Independently therefore of the consideration, that the contract with Coates of the 24th of April was a verbal contract only, I think the plaintiff is entitled to a decree.

In the preceding observations I have assumed that the agreement made with Coates on the 24th was absolute *in [*11] the first instance. But, from the contemporaneous letter of Sanders, the father, it may be doubted whether the agreement was not conditional; and if that were so, there can be no doubt that Sanders' letter, of the 23d of April, to the plaintiff was received before Sanders could have assumed to confirm the agreement made by his father.

Mr. Romilly asked that the decree might provide for the payment by Sanders of the costs of Coates.

The VICE-CHANCELLOR said that Coates was aware of the facts of the case when he took his conveyance. If Sanders had covenanted to indemnify Coates, he did not require the assistance of this Court to obtain his costs. If he had not such an express covenant, the Court would not imply one.

DECREE for specific performance of the plaintiff's contract. All necessary parties to convey. Account of the purchase money remaining due, and of the rents and profits. Costs against both defendants; but, if any part of such costs shall be recovered against Coates, Coates to be at liberty, in the name of the plaintiff, to recover such costs over against Sanders, Coates undertaking to indemnify the plaintiff in respect of the costs of such proceedings as he may take for that purpose.

[1] See *Mactier v. Frith*, 6 Wend. 103; *Averill v. Hedge*, 12 Conn. R. 436; Story on Sales, § 129, 130; *Brisban v. Boyd*, 4 Paige's Ch. R. 17. In Massachusetts no acceptance of a proposal is binding until knowledge thereof be received by the proposer. *McOulloch v. The Eagle Ins. Co.*, 1 Pick. 277.

1847.—Hunter v. Nockolds.

[*12]

HUNTER v. NOCKOLDS.

1847: 25th Nov.; 1st. and 3rd Dec.

A defendant, residing abroad, had obtained two orders from the Master for time "to answer," not including the expression that leave was given "to plead or demur." The defendant's solicitor, on application for a third order, produced before the Master a document which, he stated, was the draft of the answer, which answer would be filed without delay, and the Master gave two months further time. The defendant afterwards filed a plea to the bill:—*Held*, that the plea was an answer, and satisfied the terms of the orders giving time to answer.

VICE-CHANCELLOR:—In this case the defendant, Sir Francis Vincent, having obtained an order from the Master, which as it now stands is an order for time "to plead, answer, or demur to the plaintiff's bill, not demurring alone," has filed a plea of the plaintiff's outlawry. The plaintiff's motion, argued on the last day of Michaelmas Term, was to strike out of the order the words "plead," "or demur," and "not demurring alone," the effect of which would be to reduce the order in terms to an order for time to answer the plaintiff's bill. Supposing the motion to succeed, another motion by the the plaintiff is pending to take the plea off the file for irregularity, upon the ground that the word "answer," if the words required to be struck out were omitted, must be construed "answer" in the ordinary acceptance of the term, so as not to include a plea. I will consider the two motions as being now before the court. But, as I have no doubt as to the order I ought to make upon the motion already argued, I will at once dispose of it. If the decision of the question involved the general principle, as to the form of the order for time

* This case, and some others in the present volume, (distinguished by an asterisk referring to this note,) have, from unavoidable circumstances, been edited wholly from the written judgments of His Honor, aided, where necessary, by the briefs, and by the communications of counsel in the several causes.

[The Lord Chancellor in this case, (2 Phillips, 540,) held, that under an order for time to answer, the defendant might put in a plea, even in abatement, that the word "answer" embraces every defence which it is competent to the defendant to make, except demurring alone.]

1847.—Hunter v. Nockolds.

which a plaintiff in such circumstances is entitled to,—supposing no previous order for time to have been made,—the case would deserve much consideration. But as the circumstances of the case appear to me to furnish very satisfactory grounds *for deciding it without laying down any general prin- [*13] ciple, I have no difficulty in expressing my opinion upon it.

The defendant Sir Francis Vincent, is resident at Florence, and for that reason has succeeded in obtaining from the Master three orders for time. The first of these orders was for time “to answer,” only; the second also was for time “to answer,” only; the third (which is the order in question) was applied for upon the same grounds as the former orders. The defendant’s solicitor, upon the occasion of applying for the order, had in his hand a document which he stated to be the draft answer; he stated also that it was the intention of Sir Francis Vincent to file it without delay; and it was properly admitted by counsel for Sir Francis Vincent, upon the argument of the motion, that the draft in question was a draft of an answer, in the common acceptance of the term, which it was intended, at the time, to file. The order giving further time was thereupon made—the Master indorsing the words “two months peremptory”; and I cannot doubt, that where time was obtained under such circumstances, the order ought to have followed the terms of the two former orders. There was certainly no intention on the part of the defendant to ask, or of the Master to permit, that the defendant should demur to any part of the bill, or have larger powers under the last order than under the two preceding orders. The fact that Sir Francis Vincent bona fide intended to file, and had prepared an answer, is, as evidence, conclusive upon this point. I do not say the Master might not have given such permission if he had been asked to do so; but the purposes of the Court in requiring that application for time to answer should be special, would be defeated if parties applying for time on a specific ground, and for a specific purpose, and obtaining an order from the Master upon that ground and for that purpose were to be at *liberty to draw up the order in terms which gave [*14]

 1847.—*Hunter v. Nockolds*.

them greater liberty than they had asked, or the Master intended to give. All the defendant asked in this case—all that was in question before the Master—and all the Master intended—was to give an extension or repetition of the two previous orders. Under the order, as it was drawn up, the defendant might have demurred to ninety-nine hundredth parts of the bill, and answered a small part only, for which purpose the time granted by the Master was unnecessary, and to which the reasons giving for asking his indulgence might have been to a great extent inapplicable.

The other facts of the case I understood to be as follows:—At the time the third order for time was obtained the plea of outlawry was inapplicable. After that, and before the time had run out, process of outlawry against the plaintiff was, it is said, perfected. After this, and before the third order for time was delivered out or seen by the plaintiff's agents, the plea was filed; whereupon the plaintiff gave notice of motion to take the plea off the file. The order being still in the Master's office, application was made to the Master to alter the third order, so that it might conform with the previous orders. The Master, however, refused to act because of the motion then pending before the Court. Upon this, notice was given of a second motion to strike out the words complained of. In this case, I think the order should have been drawn up as to the act to be done in the same terms as the former orders, and, therefore, that the motion to strike out the additional words must be granted.

The principle of *Brooks v. Purton*(a) goes much beyond what I decide in this case.

[*15] *Mr. *Romilly* and Mr. *Southgate*, for the plaintiff, and Mr. *Schomberg*, for the defendant, Sir Francis Vincent.

On the plaintiff's motion, that the plea might be ordered to be taken off the file for irregularity,—

The VICE-CHANCELLOR said, that, according to the authorities.

(a) 1 Y. & C. C. 278.

 1847.—*Tippins v. Coates*.

he thought a plea was in fact an answer; but that were a party obtained leave to answer upon a representation and evidence that he would file an answer, in the ordinary sense of the word, and not any other pleading, it was a breach of faith with, and therefore a fraud upon, the Court to file a plea; and he should order the plea to be taken off the file.

Mr. *Schomberg*, for the defendant, submitted that the notice of motion assigned the ground of irregularity, whereas the pleading was not irregular. The motion, therefore, could not be granted.

The VICE CHANCELLOR.—There can be no greater irregularity than a fraud upon the Court. And, if I doubted upon this point, the defendant would gain nothing by the objection, for I should give the plaintiff leave to set his notice right.

1848:—*Feb. 23*.—The LORD CHANCELLOR, on appeal, held that the plea was an answer, and satisfied the terms of the orders giving time to answer; and therefore that there was no ground for taking the plea off the file.

TIPPIN v. COATES.

[*16]

1847: 25th Nov. and 2nd Dec.

On a motion, before publication, to re-examine a witness upon interrogatories which he has refused to answer, and that he may be ordered to produce a document which he has refused to produce, the witness only, and not the parties in the cause, are to be served with notice of the motion; and the rule is the same where the motion is made after publication, unless the case comes within the grounds upon which the Court guards against the re-examination of witnesses.

It is not an objection to such a motion that there was an irregularity in the subpoena duces tecum, or that the required document was vaguely described in the subpoena, if the witness has appeared and submitted to be examined, and showed by his

* See note, p. 12.

 1847.—Tippins v. Coates.

answer that he identified the document inquired after, with the document in his possession.

A subpoena duces tecum is a requisition to a witness to produce a document; and an interrogatory requiring a witness to set forth a document in the words, is in effect equivalent to a requisition to produce it.

The duty of a witness to produce a document called for by the subpoena duces tecum, or inquired after by an interrogatory, is the same whether the document is called for in order to be proved by himself or by another witness.

A witness cannot object to answer a question because it relates to private matters, or because it is immaterial, unless the answer may be withheld on some ground of privilege.

VICE-CHANCELLOR:—This is a common creditors' suit for the administration of the estate of Benjamin Coates. The usual decree was made at the hearing; and under the decree Mr. G. Smith, a solicitor, went in and claimed before the Master to be a creditor of the testator Coates and his partners Hammond & James, who had carried on business in partnership as solicitors at Leominster, for the sum of 950*l*., secured by the joint and several bond of the testator and his co-partners, for business done for them by Smith as their London agent, and also for the sum of 35*l* 7*s*. due to Smith from the testator only, upon the balance of an account. Mr. Smith was admitted by the Master as a creditor upon the estate for both sums.

A state of facts and charge was then carried in by Elizabeth Coates and J. Colbatch, the executors of Coates, which set forth this case:—that, in 1828, one White became bankrupt; Price and Baker were his assignees; and Coates, Hammond [*17] & James were their solicitors: *that a sum of 500*l*. coming to Price and Baker as the assignees of White, was paid by them to Smith, under an express agreement between Hammond, Colbatch & Smith, in certain causes in Chancery, that he should be permitted to receive and apply the same in satisfaction of the simple contract-debt of 35*l* 7*s*., and that the residue should be applied to the extent of 232*l* 6*s*. 3*d*., in part satisfaction of the bond-debt and interest, and that the balance should be accounted for to Hammond; and the executors charged that the proof of the simple contract debt of George Smith ought to be expunged, and the proof of the bond-debt be reduced by the

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sum of 282*l.* 6*s.* 3*d.* A counter state of facts was taken in by Smith, in which he denied the alleged agreement for the application of the 500*l.*, or rather insisted, that the 500*l.*, when it came into his hands was not bound by any such agreement, and by his affidavit, filed in June, 1847, it appears that he claims a right to appropriate, and that he has appropriated the whole 500*l.* in part satisfaction of a larger debt due to him from Hammond.

In this state of the case a commission was issued for the examination of witnesses in the country, and witnesses were examined under the same on behalf of the executors. One point to which the witnesses were examined was to show that Price and Baker, the assignees of White, were guaranteed by Coates and Hammond against any costs they might incur as such assignees, for business done by Coates and Hammond. Baker was examined as a witness, and served with a subpoena duces tecum, as to certain documents mentioned or referred to in the subpoena, the object, I presume being to show that there was no debt owing by the assignees to Coates and Hammond, to the payment of which the 500*l.* could be applicable, as between them.

*The commission was duly returned on the 15th of [*18] April, 1847, and publication passed by consent on the 26th of April, when it appeared that Baker had admitted the existence of the guarantee referred to; and that the same was in writing, and in his possession; but that he had refused to give any further answer to the interrogatory.

The fourth interrogatory, after inquiring after the existence of such guarantee in writing, proceeded as follows:—"If yea, set forth in whose possession or power such writing, note, or memorandum now is, and set forth the same in the words and figures thereof, or the purport and effect thereof." The answer of the witness, after giving the admission I have mentioned, was this:—"I refuse to now produce the said written guarantee, although the commissioner, taking this my examination has called upon me so to do, as I consider it a private and confidential paper now in my possession, between myself and the said James Hammond." There are two other interrogatories,—the 40th and 41st, the answers to which, by the same witness are short and imperfect;

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but as the right of the defendants, the executors, to compel this witness to perfect his examination, as to these interrogatories, depends upon his obligation to perfect his examination to the 4th, I shall confine my observations to that interrogatory.

I may here observe that there appears to me to be some doubt as to the regularity of the proceedings under the commission, which has given rise to the principal difficulty I have felt in the case. Where a witness demurs to answering an interrogatory, and the examination is in London, the course is for the examiner to give notice of such demurrer to the opposite party, [*19] *and to furnish him, if required, with a copy of the demurrer. This he does, without order; but when the examination is taken under a commission, the commissioners return the demurrer with the commission in the usual way; after which, the party exhibiting the interrogatories may procure an order "for the delivery of the depositions, and the demurrer, of the witness, but that such delivery is not to be considered as publication."(a) From this it would appear, that the practice of the Court, in theory at least, expects that the demurring witness, if compellable to answer further, should complete his examination before publication, although it is difficult to see how this object can be secured in practice, after the depositions are delivered out, whether the delivery out be considered publication or not. In this case the commissioner has not considered the refusal of the witness as equivalent to what is (very inaccurately) called a demurrer; and in consequence of this the executors of the testator had no notice until after publication, that their witness Baker, had refused to answer any of the interrogatories put to him for his examination, and have no mode of compelling him to give further evidence except by motion, as in *Bradshaw v. Bradshaw*;(b) and to this relief, if the witness has done wrong in refusing to produce the guarantee, or to set forth its contents, they must, in some way or other, be entitled. The Court, indeed, has gone much further than I am asked to go in the present case. Where a witness has actually given his evidence, and the depo-

(a) 1 Dan. Ch. Pr. 925, Headlam's ed.

(b) 1 R. & Myl. 358.

sitions have been suppressed upon some technical ground, the Court has sent the witness back to be re-examined upon the old interrogatories to which he had already deposed. The commission having been returned, Baker cannot be re-examined under the old commission; and if he is *compellable to [*20] complete his examination it must be under a new commission, or before the examiner.

The defendants, the executors, on the 5th of June, gave notice of motion, that they might be at liberty to file interrogatories in the office of the examiner, for the examination of Baker upon the interrogatories exhibited by them to the acting commissioner, in a commission issued in the cause for the examination of witnesses, which had been lately executed and returned; and also that Baker might be ordered to attend the examiner, and be examined at his own costs, and pay the costs of the application, and of the order which the Court might make thereupon.

It is obvious that this notice of motion asks more than the exigencies of the case require, in order to give the executors what they have lost by the refusal of Baker to answer the questions put to him. But the counsel for the executors have, at the bar, limited their application to leave to examine Baker under a commission, or before the examiner in London, as to the 4th, 40th, and 41st interrogatories, and the payment of the costs asked by the notice of motion. This was opposed on behalf of the witness Baker, and I am now to state the conclusion to which I have come.

The first objection taken was preliminary, namely, that Smith and the plaintiff, and other parties in the cause, ought to have been served with notice of motion. This, which is the only point upon which I have felt any difficulty, I will observe upon presently.

Secondly, upon the merits, it was said the witness was not bound to answer. If the objection of the witness rests upon a claim of privilege, I have no hesitation *in say- [*21] ing that objection must be overruled. I cannot find in the case a single incident upon which privilege depends; and, if privilege be excluded, the witness cannot refuse to disclose

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matters, however private, which passed between him and another person, only because such matters were private. If the objection be, that the evidence is immaterial, it has been again and again decided, that the witness has nothing to do with that.

The third objection was founded upon some alleged irregularity in the subpoena under which the witness was called upon to produce the guarantee. Without deciding upon the regularity or irregularity of that proceeding, I am perfectly satisfied that the witness, having once come under examination, cannot refuse to give evidence upon the ground assumed. It is unquestionably so at law, and must be so in equity. The irregularity in the subpoena might perhaps justify a witness in not appearing; but when he is once in the box, he must give his evidence whether he knew of the irregularity or not. But if his knowledge or ignorance of the irregularity be material, Baker's affidavit shows he returned to be examined as to the guarantee, after Mr. Smith had told him of the alleged irregularity.

The fourth objection was, that the description of the document in question in the subpoena duces tecum was so vague and general, that it was impossible to know what document was meant: To this a sufficient answer is, that the witness himself did identify it. He gave a reason for not producing it, and made no other objection.

The fifth objection was, that the interrogatory did not call upon the witness to produce the document. I think the fourth [*22] *interrogatory does require him to produce it, for, after asking in whose possession it is, it requires him to set it forth in words; but, if not, the subpoena duces tecum clearly requires him to produce it. This point was decided in *Bradshaw v. Bradshaw*.

The sixth point was this—it was said that in *Bradshaw v. Bradshaw*, the witness was required to produce the document, in order that another witness might prove it; whereas, in this case, the witness was called upon to produce it, for, as it said, no apparent purpose. The answer given to this at the bar is conclusive. In *Bradshaw v. Bradshaw* one witness was called on to produce the document, in order that another might speak to its

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execution. Here the same witness, who is called upon to produce the document, is also called upon to speak to it. In substance, the answer to this is the same as I gave to the last preceding objection.

The seventh objection was, that the depositions had been already used before the Master, and that was an objection to the examination of Baker. This the counsel for the executors were instructed to deny. The only evidence to that point is that of Mr. Smith, who says only, "having laid before the Master a copy of all the evidence taken under the commission, I proceeded upon both states of facts." That falls far short of affirming, that the Master, or any one else, made use of the evidence.

The only remaining point made is, that which I have reserved, namely, whether it is necessary that Smith, (with reference to whose claim the evidence has been taken,) the plaintiff, and all the defendants, except the executors, should be served with notice of the motion. If the question had arisen before publication, I should *have had no hesitation upon the [*23] point, for in general the witness is the only party interested in the motion. I cannot find any reported case, in which any one, except the witness, as in this case, has appeared upon a demurrer to interrogatories, or upon a motion for the analogous purpose of determining whether the witness is bound to produce a document or not. It might be convenient, in one special case, that a party should be served,—that is, where the witness, being the solicitor of a party in the cause, claims privilege on behalf of his client. In *Sandford v. Remington*,^(a) the witness gave the discovery, instead of claiming the privilege, and a party to the cause moved to suppress the depositions. But there is no such question in the present case. The objection of the witness in fact does not rest upon any claim of privilege, founded upon professional confidence, and Hammond is not a party to the suit. My doubts have arisen from this: that the application is unavoidably made after publication. If I were at liberty to deal with this particular case on its merits, no difficulty would exist. The

(a) 2 Ves. jun. 189.

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witness has clearly no right to require service upon Smith, or any party in the cause, for his own benefit. It is only, as *amicus curiæ*, that he can suggest to the Court that those parties have an interest in the question which entitles them in respect of such interest to be present. The interest of all parties, except that of Smith, is identical with that of the executors, between whom and the witness the contest is. The only possible interest they would have in appearing upon this motion, would be to see that the executors do their duty. As regards Smith, it is absurd to suppose that, in the circumstances of this case, he need be served.

Smith is the creditor, whose claim is to stand or fall by

[*24] *the evidence taken under the commission; under his advice the witness Baker refused to produce the guarantee; and he now instructs Baker's counsel. It is difficult to see what purpose he can propose to himself by instructing the counsel who represents his own client, Baker, that he (Smith) ought to be heard upon this motion. I am bound, however, to decide the case upon what I suppose to be the strict practice of the Court; and my opinion is, that the practice of the Court does not require any but the witness to be served. That this is so before publication, there can be no doubt. What is the difference, then, after publication in a case like this? The jealousy of the Court as to allowing a second examination of a witness, after publication, is founded upon the danger of the witness being tampered with. But how can that jealousy, and the practice founded upon it, apply to a case where the witness and the party calling him are hostile to one another—and the question between them is, whether the witness shall be forced to give evidence which he refuses to give? To apply to such a case a rule founded on the possibility of the witness being tampered with, would be extravagant; and if that danger be excluded, the case is free from difficulty. The executors making this application, are not asking for anything new, but only for that to which the previous proceedings give them a right. In the Master's office it was decided, in the presence of all proper parties, that a commission should issue, and that the executors should have the conduct of the examination of witnesses, and examine them to such points as

 1848.—Phillipson v. Gatty.

they should be advised. The executors have not forfeited or lost the trust so committed to them, and they are now carrying it out. I do not say that special circumstances, evidencing or raising a suspicion of collusion, might not alter the case; but such supposition is *excluded in this case. I decide [*25] this upon general principles, independently of the special circumstances of the case, and not without inquiry from the officers of the Court. Let a new commission issue, and let the witness attend and produce the document, and be examined on the 4th, 40th, and 41st of the interrogatories at his own expense, and pay the costs of such new commission, and of executing it, and the costs of this motion.

Mr. Romilly and Mr. Speed were of counsel for the executors, in support of the motion.

Mr. Roll and Mr. Elmsley, for the witness Baker.

The reporter has been informed that the following authorities were referred to in the argument: *Parkhurst v. Lowten*, (a) *Bradshaw v. Bradshaw*, (b) and *Carpmael v. Powis*, (c)

*PHILLIPSON v. GATTY.

[*26]

1848: 15th and 17th January.

To a suit by one or more cestuis que trust against trustees, alleging that the trust fund had been invested on improper security, and seeking to have it restored, all the cestuis que trust of the fund must be parties; and if the fund be held in trust for a class of persons, there must, before the cause is heard on the question between the plaintiffs and the trustees, be evidence that all the members of the class are before the Court.

A BILL by some of the cestuis que trust of a fund against the trustees, complaining of an investment alleged to have been

(a) 2 Swans. 194.

(b) 1 Russ. & Myl. 358.

(c) 1 Phil. 687.

1848.—Phillipson v. Gatty.

made by the latter upon inadequate security. The fund had been settled upon a husband and wife for their successive lives, with remainder to the children of the marriage, and their issue, subject to the appointment of the husband and wife, and in default of appointment to all the children equally. The husband and wife had appointed the fund to their son and daughter in equal shares, and in the event of either of the appointees dying in their parents' lifetime, leaving issue, the share of him or her so dying to be equally divided among such issue; and in case of the death of either in their parents' lifetime, without issue, the share of him or her so dying to go to the survivor. At the hearing, it appeared that the son had children who were not parties, and the cause stood over, with leave to amend.

The bill was accordingly amended by introducing other names, averred to be those of all the children of the son then living, and making such persons defendants. No further answer was filed by the original defendants. In this state the cause was again set down for hearing.

Mr. *Walker* and Mr. *Giffard*, for the plaintiffs.

Mr. *Bethell*, Mr. *Wood*, and Mr. *Smith*, for the trustees, submitted that the objection for want of parties was not removed. The persons introduced as defendants by amendment might [*27] indeed constitute, as the *bill alleged, the whole class of grandchildren of the appointors, but of that there was neither admission nor evidence. The trustees might have to account again to other parties, who were not now before the Court: *Hawkins v. Hawkins*.(a)

Mr. *Romilly* and Mr. *Rasch* appeared for several of the defendants, the cestuis que trust, including the children who had been made parties by amendment, and did not support the objection.

Mr. *Walker* submitted, that the cases where this question arose

(a) 1 Hare, 543.

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were of two kinds, one where the object of the suit was the distribution of the fund, and the other where no distribution was sought; but the suit was instituted merely for the protection of the trust property, or to effect an object plainly beneficial to all the cestuis que trust. The present case was one of the latter class. The bill prayed the appointment of new trustees; but this part of the prayer the plaintiffs were content to waive: *Montagu v. Nucella*,^(a) *Kimberly v. Tew*,^(b) *Malone v. Malone*.^(c)

VICE-CHANCELLOR:—The plaintiff is one amongst many cestuis que trust interested in property, of which the two first-named defendants are trustees. Some of the remaining cestuis que trusts are classes of persons,—“children and grandchildren.” The object of the suit is to compel the trustees to replace a sum of money alleged to have been lost by a breach of trust, and to remove the trustees *and appoint new ones. No [*28] distribution or administration of the trust fund nor any declaration of right is asked.

As the bill was originally framed, none of the classes were named as parties. The bill was framed upon the principle that it was enough that some only of the parties interested were parties to the suit. The correctness of this view was argued at the hearing, in July, 1847, and I decided against it. It may be true, that, if in such a case the decision be to the full extent in the plaintiff's favor, the absent cestuis que trust might not be damaged, unless, indeed, by the transfer of their fund to new trustees, in the choice of whom they had no voice. But it is otherwise if the case be decided against them, unless they were held not bound; but as the trustees have an interest in that, I thought the trustees had a right to insist that the suit should be so constituted that the question of their liability might be decided once for all. An order was accordingly made for the cause to stand over, with leave to add parties.[1]

(a) 1 Russ. 173. (b) 4 D. & War. 139. (c) West's Appeal Cases, 637.

[1] See *Brown v. Ricketts*, 3 John. Ch. R. 149; *Devos v. Fanning*, 4 John. Ch. R. 149; *Hallett v. Hallett*, 2 Paige's Ch. R. 15; *Bailey v. Ingles*, 2 Paige's Ch. R. 278; *Brewster v. Brewster*, 4 Sandf. Ch. R. 22; *Park v. Ballentine*, 6 Blackf. R. 223.

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The bill has now been amended by adding parties who are said to constitute the classes referred to; but no evidence has been given of the fact; and the trustees have again raised the objection.

It was admitted in the argument, that, if the suit were for distribution, it would be necessary to prove that the parties constituting the class were before the Court; but this, it was said, was not necessary for the purpose of arguing the points of law raised in this case. In support of this distinction, *Malone v. Malone* was referred to. Now, the reason why, in case of distribution, it is necessary that all the parties should be proved *or shown by the Master's report to be before the Court, [*29] is, that the Court cannot effectually save the rights of the absentees, if any there be. The distribution amongst parties not entitled to the fund would, or might, injure the absentees. The decree would indemnify the trustees, and the absentees (if any) who by the distribution had lost the security for their shares, would have to pursue their rights against the parties who had shared in the distribution. The same principle must apply in all other cases similarly circumstanced. There is no particular force in the word "distribution." Where the mischief is the same, the rule must be the same.

In *Malone v. Malone* the observations of Lord Cottenham are very guarded. He says, that Lord Eldon thought that the universal rule, adopted by Sir John Leach, of referring it to the Master, in the first instance, to ascertain who were next of kin, occasioned very considerable expense, which possibly, at last, might be useless; and, therefore, he observes, "finding that he had a next of kin before the Court who was entitled to fill that character, whether jointly with others or not, he thought it better to decide the question of law between the parties than first to put them to the expense of deciding who were the next of kin, which might become useless; but in all those cases there was a person filling the character which he assumed."^(a) All I understand by that is, that Lord Eldon would sometimes hear

(a) *Malone v. Malone*, West's Appeal Cases, p. 656.

1848.—*Ex parte Corporation of Cambridge, In re Eastern Counties Railway Co.*

the case *de bene esse* in the absence of parties who might have an interest in the property, and be governed by the view he took of the case after having heard it. If his view was favorable to the absentees, probably no harm would arise from this course; but if *against them, he could not give his judgment in their absence. He could not bind them, being absent; and the trustees had a right to require the suit to be so constructed that the question might be finally determined. The same course I have often taken, without knowing that it was sanctioned by Lord Eldon's authority. I have, however, felt that such a course of proceeding is liable to the objection, that the Court, by requiring the absent parties to be brought before it after the argument, although its judgment may not be formally delivered, has, in truth, prejudged the case. The Court has formed its opinion of the case, and then called for the absent parties to see if they could change it.

In this case, it is clear that the point which has been argued for the plaintiffs on the amended bill was heard and decided at the original hearing, from which there has not been any appeal.

EX PARTE THE CORPORATION OF CAMBRIDGE, IN RE THE
EASTERN COUNTIES RAILWAY COMPANY.

1848: January 30.

All the lands of a Municipal Corporation are held "upon the same or the like uses, trusts, or purposes," within the sect. 69 of the Land Clauses' Consolidation Act, (8 & 9 Vict. c. 18,) so that money paid for the compulsory purchase of one part of the lands of a Municipal Corporation may be applied in the redemption of an incumbrance upon another part of the lands of the same Corporation.

THE act of Parliament empowering the Eastern Counties Railway Company to make their railway, provided that the purchase money payable by them in *respect of any lands taken from corporations, and other parties prevented from treating, should be paid into the Bank, and there remain

1848.—*Ex parte Corporation of Cambridge, In re Eastern Counties Railway Co.*

until it should be applied "in the purchase or redemption of the land-tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes,"(a) or until it should be applied for the other purposes mentioned in the act.

The Company, for the purposes of the railway, took a piece of land belonging to the Corporation of Cambridge. Other lands belonging to the Corporation had been previously charged, by way of mortgage, with moneys borrowed for municipal purposes. The petition prayed, that the money paid into Court by the Railway Company, in respect of the land they had taken, might be applied towards the redemption of the other lands of the Corporation.

Mr. *Hare*, for the petition, referred to the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 92.

Mr. *Heathfield*, for the Company, submitted to the Court, whether the incumbrance could be said to come within the description mentioned in the act. It did not affect the land in respect of which the money was paid; and the question was, whether it affected other lands settled therewith to the same or the like uses, trusts, or purposes. The different lands of the Corporation were, it was probable, acquired at various times, under divers titles, and originally devoted to divers objects.

[*32] *The VICE CHANCELLOR considered the lands of the Corporation to be all settled and held for the same municipal purposes; and ordered the money to be applied in redemption of the mortgaged lands, as sought by the petition.

(a) The provision is the same as that of the Land Clauses' Consolidation Act, 8 & 9 Vict. c. 18, s. 69.

1847.—*Savage v. Lane.*

SAVAGE v. LANE.*

1847: Nov. 23 and 25.

The admission of an executor by his answer, in a creditor's suit, that he had paid certain legacies bequeathed by the testator, is not an admission of assets entitling the plaintiff to a decree against the executor for payment of his debt without taking the account, when the bill does not specifically charge the defendant with having made himself personally liable, but prays that an account may be taken, and the estate administered in a due course of administration.

Whether such admission of the payment of legacies by the executor is a conclusive admission of assets in any case, *quære*.

Where a testator, in his lifetime, conveyed to trustees the mines and minerals under certain lands upon trusts for himself (the testator) for life, and after his death upon trust for sale, and out of the proceeds—first, to pay all his debts, so as to discharge his real and personal estate therefrom; secondly, to apply 3000*l.* to the purposes of his will; and, lastly, to divide the surplus among certain persons therein named—the persons to whom the surplus is thus given are proper parties to a creditor's suit seeking to follow the real as well as the personal estate of the testator; but the Court may, in its discretion, make a decree for administration in their absence.

A BILL by a specialty creditor against the executors and devisees of the testator for administration of his personal estate, and payment of the plaintiff's debt out of the real estate devised if the personal estate should be insufficient.

Mr. *Romilly* and Mr. *Grenside* appeared for the plaintiff, Mr. *Bichner* for the executors and some of the devisees, and Mr. *Malins* for others of the devisees.

VICE-CHANCELLOR:—This is a bill by the assignee of a bond debt for payment out of assets, upon which two points have been argued before me. The first question that has been *raised is, whether, I am to decree an account of the [*33] personal and real estate of the testator, which is the relief prayed by the bill, or whether I am at once to decree payment of the plaintiff's debt personally by the executor.

* See note, p. 12.

1847.—*Savage v. Lana*.

The ground upon which I am asked to make the latter decree is an implied admission of assets by the executor, by having paid some legacies of the testator whilst the plaintiff's debts remained unpaid. A passage from the answer of the executor, admitting that such payment of legacies had been made, was read by the plaintiff, and relied upon as sufficient to entitle him at once to a decree for payment of his debt, although the answer suggests that the legacies were paid under a mistake by the executor as to the amount of the assets.

Without relying upon this suggestion in the answer, I am of opinion that the plaintiff is entitled, in this stage of the cause, to an account and nothing more. The bill does not make the point, that the defendant has made himself personally liable to pay the plaintiff's debt by admission of assets, or on any other ground, but, on the contrary, prays an account of the testator's assets and payment of the plaintiff's debt in a due course of administration.

Admitting, for the purposes of the argument, (but not further,*[34] ther,) (a) that payment of a legacy *of 5*l.*, whilst debts

(a) *POSTLETHWAITE v. MOUNSEY*.

1842: March 11th and 12th.

Payment by the executor of the interest of a legacy to the tenant for life under the will is not conclusive as an admission of assets by the executor; but such payment may be explained as having been made by mistake, or for other reasons or causes; and in that case the usual account of assets may be directed at the suit of parties interested in the estate.

The testator gave all his freehold and leasehold and other personal estate to his son, the defendant, John Mounsey, absolutely, but he charged his personal estate (except the leasehold estate) with a legacy of 150*l.*, which he bequeathed to the plaintiff, his daughter, and two other legacies of 90*l.* and 60*l.* to the two other defendants, her children, and he gave the interest of the two latter legacies to the plaintiff for her life, and appointed the defendant John Mounsey, sole executor. The testator died in February, 1826, and the defendant, John Mounsey proved the will in September, 1826, and paid the debts and funeral and testamentary expenses of the testator; he also paid the plaintiff her legacy of 150*l.*, and until February, 1838, interest at 4*l.* per cent. on the other legacies of 90*l.* and 60*l.* The bill was filed in 1840, and charged, that the payment of the legacy of 150*l.* by the defendant, John Mounsey, after he had proved the will, and ascertained the state of the testator's affairs and property, operated as an admission of assets received by the defendant, exclusive of the leasehold estate, sufficient to answer and pay all the legacies bequeathed by the said will; and, in particular, that the payment of interest

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remain unpaid, may be an admission of assets to pay all the testator's debts, it is obvious that *the circumstances [*35]

by the defendant to the plaintiff on the legacies of 90*l*. and 60*l*. for a period of twelve years and upwards since the death of the testator was sufficient evidence that the defendant had assets in his hands or power, to answer and satisfy the said last-mentioned legacies. And the bill charged, that, under the circumstances, the defendant had admitted assets, and ought to be personally decreed to pay the said legacies of 90*l*. and 60*l*. respectively, without reference to the amount of the personal estate of the testator come to his hands, or the accounts relating thereto. The bill prayed, that the defendant might be decreed to pay the said legacies accordingly, or if the Court should be of opinion, that, under the circumstances, the defendant had not admitted assets sufficient to pay the same, that the usual accounts might be taken.

The defendant, by his answer, said, that the personal estate of the testator exclusive of the leasehold estate, was not sufficient to pay the debts and legacies; and that he had paid the legacy, and the interest on the others, under mistake, and also in ignorance of the true construction of the will.

Mr. *Girdlestone* and Mr. *W. Rudall*, for the plaintiff, argued that the payments made by the defendant Mounsey amounted to an admission of assets: *Cook v. Martyn*,(a) *Corporation of Sons of the Clergy v. Swainson*,(b) *Bingham v. Bingham*,(c) *Horsley v. Chaloner*,(d) *Barnard v. Pumfret*,(e) *Whittle v. Henning*,(f) *Foster v. Foster*,(g) *Philanthropic Society v. Hobson*,(h) *Nicholls v. Leeson*,(i) *Chifion v. Cockburn*,(k) *Pickering v. Pickering*,(l) *Spode v. Smith*,(m)

Mr. *Sharpe* and Mr. *Roll*, for the defendant Mounsey, said, that the payments, at the utmost, raised nothing more than a presumption of assets, which was not conclusive, but might be rebutted by proof of the actual facts. It did not amount to an admission: *Orr v. Kaines*,(n) *Young v. Walter*,(o)

The VICE-CHANCELLOR said, that there might, no doubt, be a case in which an executor, knowing the state of the assets, and assenting to a legacy, would be bound to pay it; but it did not appear to him that this was such a case. It would be difficult to hold that the payment of one legacy would, of itself, bind the executor to pay all the legacies given by the will. Suppose a case in which small legacies were given to servants, and the executor chose on his own responsibility to pay those legacies at once, without reference to the state of the assets, it would be hard to say that he had thereby conclusively bound himself to pay all the legacies given by the will. The Court allowed an executor who, from an erroneous conclusion of law or fact, had paid parties, having claims upon the assets of his testator, out of

(a) 2 Atk. 2.

(d) 2 Ves. 83.

(g) 2 Bro. C. C. 618.

(k) 3 Myl. & K. 76.

(n) 2 Ves. 194.

(b) 1 Ves. 75.

(e) 5 Myl. & Cr. 63.

(h) 2 Myl. & K. 357.

(l) 2 Beav. 31.

(o) 9 Ves. 365.

(c) 1 Ves. 126.

(f) 2 Beav. 396.

(i) 3 Atk. 573.

(m) 3 Russ. 511.

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under which such payment was made may be material. [*36] And, unless the plaintiff makes the *point by his bill, instead of praying an account, the defendant has no opportunity of making a case in answer to the claim. I was told, however, that there were two authorities showing that it was unnecessary that the point should be made by the bill—*Woodgate v. Field*(a) and *Rogers v. Soutten*.(b) But in both those cases the executor admitted assets, which is equivalent to saying, 'Do not go to the expense of an account, for I admit that which it is the object of the account to establish.' In *Woodgate v. Field*, the admission was an admission in terms. In *Rogers v. Soutten*, the defendant admitted the receipt of 2500*l.* personal estate, and stated the amount of debts, which left a balance more than sufficient to pay the legacies. Stopping there, the admission of assets was complete. But, notwithstanding the above facts, the executor denied assets; but the meaning of that denial depended upon the explanation he gave in his answer. The explanation was this,—that the executor had claimed to be entitled to the testator's real estate. This claim was opposed by others; and the dispute ended by a compromise, according to the terms of which the executor

the order in which they were properly payable, to stand in the place of the parties whom he had thus preferred; but it did not give to the erroneous payment the effect of rendering the executor liable to pay all claims of equal degree. In *Barnard v. Pumfrett*, Lord Cottenham proceeded upon the issue which the defendant had taken, that the property connected with the trade,—without which the defendant said the estate was insufficient to pay the legacies,—had been given or sold to him by his father, the testator, in his lifetime: the defendant examined witnesses to prove that case. Lord Cottenham said, that if the facts had been proved they would have been material, but no importance could be attached to the evidence which the defendant had given; and he then proceeded to examine the other circumstances; upon which, taking the principal case made by the defendant to be unsupported by evidence, he held that the defendant had made himself liable. I do not think I can, upon this case as it now stands, hold the defendant absolutely bound personally to pay the legacies.

The decree was made for the usual accounts, without prejudice to any question in the cause.

 (a) 2 Hare, 211.

(b) 2 Keen, 598.

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was to have the real estate, he undertaking to pay the testator's debts, and funeral and testamentary expenses, and the adverse claimants were to have the 2500*l.* personal estate; the compromise was carried out, and the executor paid them the 2500*l.* accordingly. The question, then, which the Master of the Rolls had to decide was, whether the expenditure by the executor of the personal estate (which, in fact, belonged *to the [*37] legatees) for his own private purposes discharged the executor from the admission of assets he had made in the first instance. The Master of the Rolls held, that it did not discharge him; in which I entirely agree. The denial of assets was not, as the Master of the Rolls observed, a denial that he had possessed assets sufficient to pay the legacies, for that he had admitted; but simply a denial that he had them in hand at the time of filing his answer, which he had not only because he had misapplied them, which, of course, the Court upon a settled practice, could not regard: *Collis v. Collis*.(a)

The plaintiff is, upon this view of the case, entitled to a decree for an account. But a preliminary objection was taken to such a decree, upon the ground that certain persons interested in parts of the testator's property, under a deed executed by the testator in his lifetime, were necessary parties. The deed which is set up by the answers, and proved in the cause, is dated the 11th June, 1830. It is made by the testator of the first part; the defendant, Thomas Lane of the second part; and Thomas Lane, Henry Bowyer Lane, and Farindon Lane, of the third part. By this deed the testator conveyed the mines and minerals under certain freehold and copyhold lands to Thomas Lane, in fee, upon trust for testator during his life, and after his death upon trust to sell the same, and out of the proceeds—first, to pay and discharge all the debts of the testator, so as to relieve and discharge all the real and personal estate of the testator from the same; and, secondly, to pay 3000*l.*, to be applied for the purposes of the testator's will; thirdly, to divide the surplus into three parts, and pay it to the persons therein mentioned. It is these last-men-

(a) 2 Sim. 365.

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[*38] tioned parties who, the defendants *contend, ought to be parties to the suit. Thomas Lane, the trustee under the deed, is already a party as an executor of the testator. The deed contains very complex provisions as to the management of the trust until a sale, but these do not affect the present question. At the time of the argument, I stated my opinion generally upon the law applicable to this objection. The argument was afterwards addressed to that point; and I will re-state my opinion upon it.

The bill is to be paid out of assets:—1st, the personal; 2ndly, the real. It is immaterial for the present purpose whether the interest which the testator had in the mines and minerals comprised in the deed of the 11th of June, 1830, was real or personal estate. It is sufficient that it be shown that he had an interest in those mines and minerals which at his death constituted part of his estate, and was applicable to the payment of his debts.

Now, nothing can be more clear than this,—that where payment of a debt is sought out of the assets of a deceased debtor, the creditor must bring before the Court the persons who stand in the place of the testator in respect of those assets,—the personal representative in respect of the personal estate; the heir, in respect of the real estate descended; and the devisee, in respect of devised estates. The assets cannot be reached or marshalled without this; and the only question in this case is, whether the creditor is entitled to say he will pursue the particular portion of the assets which is comprised in the deed of the 11th June, 1830, only through the testator's representatives, or whether he is not compellable in the circumstances of this case to pursue that

portion of the assets directly in conjunction with the other [*39] assets of the testator. That the mines and minerals *in question are assets of the testator cannot be disputed.

Suppose the deed of the 11th of June, 1830, had contained no gift of the ultimate surplus of the proceeds of the mines and minerals after paying the debts. In that case, according to modern decisions the whole would have been a trust for the testator, and at his death the mines and minerals would have been part of his assets. How, then, is the case affected by the circumstance that

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the ultimate surplus is given over to volunteers? The only effect of that gift is, that the testator cannot recall the interest so given. The deed is binding upon him *quoad hoc*. But to the extent of the amount of the testator's debts, his interest in the mines and minerals is untouched by it.

Another proposition is equally clear,—that the Court, in administering the assets of the testator, will have regard to the provisions of that deed, so as to throw upon the mines and minerals (if that be the effect of the deed) the testator's debts, in exoneration of his devised and other estates. The principle of marshalling may not, perhaps, be always just in practice towards creditors; but the principle is sound, and cannot be disputed. One party has two funds to resort to, and the Court compels him to resort to that which will leave the rights of others *inter se* undisturbed.

But it was said that the plaintiff did not claim under the deed of the 11th of June, 1830, and therefore they might disregard it. There is an obvious fallacy in this argument. A creditor does not claim under the executor, or heir, or devisee: he claims paramount to all. Yet if he comes for payment of his debt out of assets, he is compelled to bring all parties before the Court who represent the different portions of the assets, which the Court, professing to give the creditor his due, will *marshal in favor of parties claiming as volunteers under [*40] the testator. The plaintiff, if bound to bring the parties interested under the deed of the 11th of June, 1830, before the Court, is bound to do so, not on the ground that he claims under the deed, but because the parties who do claim under it are interested in the course of the administration of the assets.

The real question is, could parties interested under the deed object to being made parties to this suit?—or, in other words, could trustees who have accepted this particular trust, and those who accept benefits under the deed, refuse to be parties to a suit to administer the assets of the testator, the object of the deed being, by means of its provisions, to protect the testator's other assets from his debts?

As the plaintiff, however, has contended, and I think with
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apparent reason, that if I should decide that the persons interested under the deed of the 11th of June, 1830, are necessary parties to the suit, the payment of the testator's debts may be greatly delayed; and as the delay, which may possibly result from my making a decree which, for the present at least, will avoid that inconvenience, will (if it should occur) fall upon the plaintiff, I will endeavor to frame inquiries which may possibly enable the creditors to obtain payment of their debts against the absent parties, through the present parties to the suit, without injury to any.

THE usual directions for an account of debts, &c., and of the personal estate, &c., and for application thereof, in a due course of administration. Refer it to the Master, to inquire whether the testator died possessed of any and what real estate; and let the Master take an account thereof, and inquire whether the same or any [*41] part thereof is affected by any charge or incumbrance; *and in making the last mentioned inquiry, the Master is to inquire and state what is the state of the property comprised in the said indenture of the 11th day of June, 1830, and whether any part of the property subject to the trusts of that indenture is now available for the payment of the testator's debts; and if so, to what amount. And if the Master shall find that there is such a fund, and the same shall be insufficient for the payment of the testator's debts, let the Master inquire whether the trustee acting in the trust of the said indenture is willing, by sale or otherwise of the mines and minerals under such trusts, to raise a fund sufficient for the payment of the testator's debts; and if not, whether a fund may be so raised by sale of the testator's interest in the mines and minerals, subject to the trusts of the said indenture; and let the Master inquire whether the defendant, Thomas Lane, has advanced any and what sums for the benefit of the testator's estate. But these inquiries are to be without prejudice to the rights and interests of all parties claiming under the said indenture of the 11th of June, 1830, and without prejudice to any question in this cause, or to the question whether it may not be necessary to make parties to this suit the persons interested under the said indenture of the 11th of June, 1830.

 1847.—Curling v. Flight.

CURLING v. FLIGHT.*

1847: Nov. 17 and 20; Dec. 20.

On a contract for the sale of a share in a mine described as "one 192nd part or half share of the Tresavean mine, in the district of Gwennap, in the county of Cornwall," it is not sufficient for the vendor to show a title to the specified share of the mine as between himself and his co-adventurers, without showing some title in himself and his co-adventurers to the mine of which he had contracted to sell a share. As to the title he must show, *quære*.

THE facts of this case are fully stated in the judgment.

Mr. Wood and Mr. Tylotson, for the plaintiff.

Mr. Romilly and Mr. Rogers, for the defendant.

VICE-CHANCELLOR:—This is a bill by a vendor for the specific performance of an agreement for the purchase, by the defendant, *of shares in certain mines to which the [*42] plaintiff says his testator, Daniel Curling, was entitled.

The bill alleges, that, in conformity with a custom well known in mining districts, the names of the owners of shares in mines are registered in a book kept by the managing adventures in the mine, called the "Cost Book;" that the due and lawful entry of the name of any individual in such cost book is evidence of his title to the number of shares of which he is there stated to be owner; and that, in buying and selling shares in mines, no other evidence of the vendor's title is required beyond the acknowledgment of his title as owner in the cost book; and the bill prayed a decree for specific performance upon that principle. To this bill the defendant demurred; but the demurrer was overruled.(a) The defendant then put in his answer; and a motion was made by the plaintiff for a reference as to title, upon the ground that there was no other question in issue. It was then argued, that special directions should be given as to the mode of

*See note, p. 12.

(a) See *Curling v. Flight*, 5 Hare, 242.

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making out the title. There was no suggestion, that there was any equivocation or ambiguity in the terms of the agreement as to what the subject of the contract was; and it appeared to me that there was no ground for making, and I declined to make, any such special reference.

By the order made upon the motion, it was referred to the Master in rotation to inquire and state whether a good title could be made to the lots sold to the defendant according to the contract mentioned in the pleadings; and in case the Master should find that a good title could be made to the said lots, then he was to inquire and state at what time it was first shown that such good title could be made.

[*48] *It is important to observe, that the only question which this order leaves open is the question of title; and upon this order the parties proceeded before the Master. The plaintiff, by his state of facts, insisted, as he did in the bill, that he was not bound to give any evidence of title except the cost book and the assignments to Daniel Curling the testator,—apparently entitling him to have his name registered in the cost book as the proprietor of the shares referred to.

The Master has made a special report in favor of the title.

[His Honor stated the Master's Report, by which it was found that Daniel Curling, the testator, was at the time of his death possessed of certain shares in mining concerns or partnerships; that he made his will, and appointed the plaintiff executor, the testator's death and proof of the will by the plaintiff; that the plaintiff, as such executor, proceeded to sell the shares of the testator in the said mining concerns or partnerships; and for that purpose the plaintiff employed Mr. Wharton, an auctioneer, and he, by the directions of the plaintiff, prepared and circulated particulars and conditions of sale, and advertised the said shares to be sold by public auction at the Auction Mart, London, on the 16th day of October, 1844; that, in the said printed particulars, lot 1 was described as one 192nd part or half-share in the celebrated Tresavean mine, in the district of Gwennap, in the county of Cornwall; lot 7 was described as one 274th part or share in Wheal Jewell copper mine, in Gwennap; lot 8 was de-

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scribed as one 274th share in ditto ; lot 10 was described as three-fourth parts of a 94th part or share in East Wheal Crofty mine, in Camborne district ; lot 13 was described as one 200th share in Bottalack tin and copper mines, near Land's-end lot 24

*was described as one 100th part or share in the Gogman [*44] lead mine, Welsh, in the district near Aberystwith ; lot

25 was described as one 100th share ditto ; and lot 31 was described as five 1000th parts or shares in Stray Park and Camborne Vean copper mines ; that the said printed conditions were,—1.

The highest bidder to be the purchaser : 2. No person to advance less than 5*l*. per cent : 3. The purchasers to pay immediately 20*l*. per cent. on the purchase money, and sign an agree-

ment for payment of the remainder on or before the 30th then instant ; but if, from any cause whatever, the purchases should not be completed, the purchaser should pay interest on the balance of the purchase money, at the rate of 5*l*. per cent. per annum, until the purchase should be completed, without prejudice to the last condition : 4. That the vendors would make proper

transfers or assignments on stamps upon receiving the remainder of the purchase money agreeably to the third condition ; such stamped assignments or transfers were required to be prepared by and at the expense of the respective purchasers, who should be entitled to all dividends which should be declared from and after the day of sale : 5. If, through any mistake, the lots should be improperly described, or any error or mis-statements should be inserted in the particular, such error or mis-statements should not vitiate the sale ; but a proportionate compensation to be paid or returned either way, to be settled by the auctioneer or some person to be agreed upon by the vendor and purchaser ;—that the shares were accordingly put up for sale, when the defendant,

Thomas Flight, became the purchaser of the said eight lots at the respective sums mentioned, amounting altogether to 150*l*. 10*s*., and paid a deposit of 300*l*. The report then set forth the

requisitions as to title and the answers contained in the correspondence which preceded the suit ; and the Master found

that the mines *were acquired and managed as trading [*45] concerns ; that they were conducted on the "cost-book

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principle," the names of proprietors and numbers of shares being entered in the cost book, and the profits divided accordingly; that such entries had been commonly treated as evidence of the title of the shareholders to their shares; that, upon purchasers or transfers, it is the custom to enter the name of the purchaser or transferee in the cost book, in the place of the vendor or transferor, when the title of the purchase or transferee was considered to be complete; that the defendant had been furnished with extracts of the books of the pursers of the mines, and from the cost books, certifying the rights and interests of the testator, and that his name stood registered as the proprietor of the shares comprised in the contract. And the Master reported, that the plaintiff submitted before him that a good title could be made to the said lots so sold to the said defendants according to the contract, and that it was shown that such good title could be made in the month of May, 1845, and before the institution of the suit; and the defendant contended before him, that a good title had not been shown to the said lots according to the contract; and he did not find that the sufficiency of such title was doubted or disputed if legally and fully verified and proved, but the defendant contended that that was not done, and could not be done without the documents referred to in proof thereof, or some of them, were produced and abstracted for the purchaser, and left with him to manifest his title, as usually done in the sale and transfer of other hereditaments, which the vendors, in the case of property of the kind in question, denied to be usual or necessary, and declined to furnish upon the grounds and reasons mentioned in their said state of facts, which grounds and reasons he submitted to the

Court: and whether thereupon the defendant could or [*46] *could not refuse to complete his purchase; but he was of opinion that the several certificates and other documents stated in the said state of facts of the plaintiff fully showed that a good title could be made to the lots in question, and each of them; and he submitted that such good title was first shown in the month of May, 1845.]

To this report several exceptions were taken; the substance of which was, that the Master's finding was erroneous, and that

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he ought to have found that a good title had not been shown, according to the contract.

The question thus raised is one of considerable importance. The evidence (I state this, of course, without prejudice to any point which may hereafter arise upon it) appears to me to show, that, as between the different adventurers in the mine, all of whose names are, or ought to be, registered in the cost book, the entry of a name is evidence, and, *prima facie*, sufficient evidence, of the right of the party whose name is so entered to share in the profits of the adventure. But, as between the body of adventurers on the one side, and strangers who may possibly claim adversely to the adventurers on the other, the cost book is not evidence for any purpose. The question therefore which the exceptions raise is, whether the purchaser, in the present case, is bound to accept a title that at the utmost shows only his rights to certain shares, as between himself and the present possessors of and adventurers in the mines, but leaves untouched the question, whether he and those possessors and adventurers have any title to the mine, of which the plaintiff has contracted to sell certain shares.

It was with reference to this question that I referred *to the terms of the agreement. If the terms of the [*47] agreement import that the vendor is merely to retire from the adventure, and give the purchaser the place which he occupied there, and in the cost book, as the holder of shares between himself and the other shareholders, with or without title as against third persons, that may possibly entitle the plaintiff to what he asks by this bill. But if the contract be not so limited,—if according to its true import the vendor agrees to sell shares in a mine,—I cannot understand upon what principle he can ask me to decide that he is not bound to tell the purchaser what his interest is in the mines, shares of which he has contracted to sell. The argument has been carried, and must be carried to this length,—that the purchaser has no right to inquire whether the interest of the joint adventurers in the mines is freehold or leasehold, or whether they work by licence or by trespass only,—or what (if any) is the title they have acquired by trespass. If the

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vendor had stated, in the particulars of sale, that he had by purchase from former co-adventurers acquired a title to all the shares in the mine, and had offered all,—that is, the mine itself,—for sale, I cannot think that the Court would admit the proposition, that the vendor had nothing to do, upon the question of title, but to show his own name lawfully, as against all former shareholders, inserted in the cost book as sole owner of the mine. If the argument of the vendor be well founded, the purchaser paying his money to-day might be evicted to-morrow, without having cause of complaint that he had not got all to which his contract entitled him. I do not say that such a contract might not be made,—but I think that is not the contract made in this case. I think the subject of the contract was shares in mines; not such interest (if any) as plaintiff might have; and that being,

[*48] in my opinion, *the construction of the contract, the question properly arises upon the exceptions.

It was said, however, that inconvenient consequences (to which Mr. Wood's argument was pointed) leading to an absurdity will follow from this decision. It was said, that if the Court once holds that the cost book is not conclusive upon the question of title, it does in effect decide that the vendor of a share in a trading partnership is bound to make out a marketable title to every article constituting the partnership stock in trade; and to show the absurdity of such a conclusion, the case was suggested of a partner in a brewery, with the consent of his partners, retiring from the concern, and selling his share (*eo nomine*) to a third person; and it was asked whether, in that case, the purchaser could require that a marketable title should be shown to every part of the partnership of premises, and to every public house which the concern might hold as part of its stock. I certainly do not mean to decide any such point. The title which a purchaser is entitled to require may vary with the subject matter and terms of the contract. The partners in a brewery might well agree amongst themselves to purchase as part of their stock, at a price properly regulated, a property the title to which was known not to be marketable, or to acquire such a property in satisfaction of a bad debt or otherwise; and it might well be that a purchaser of the

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share of a retiring partner, *eo nomine*, might, in the absence of special circumstances, be bound to take such title as his vendor had. But that, if admitted, would not excuse the vendor from showing (beyond the question of his own right to a given share in the concern) what, in fact, the title of the partnership was to the aggregate concern, nor, perhaps, to particular property so acquired. Suppose the partnership to have no title, *would the purchaser be compelled to complete his con- [*49] tract? This, it was admitted, he could not be bound to do. But if the vendor, who alone can know what the title is, is not bound to show it, how is the purchaser to know that he gets what he is entitled to? I do not now decide the extent to which the purchaser buying a share in a working mine can compel the vendor to go in making out a marketable title. All that I decide is, that the vendor cannot simply refuse to give any account whatever of the right of himself and his co-adventurers to the mine, shares in which he has contracted to sell. I decide nothing more.

The arguments of Mr. Wood and Mr. Tillotson, on behalf of the plaintiff, against the exceptions were, that what the plaintiff had contracted to sell was not an interest in land, but a share in an adventure,—that it was not practically treated by the owners and dealers in such property as anything more than a share in a partnership, there was no doubt; that it was not in law considered an interest in land was shown by many authorities. In *Pickering v. Appleby*, (a) as to shares in the copper miners' company; *Forster v. Hale*, (b) as to colliery shares; *Bligh v. Brent*, (c) waterworks' shares; *Bradley v. Holdsworth*, (d) railway shares; *Thompson v. Thompson*, (e) gas-works shares; and in support of the same point they also cited *March v. The Attorney General*, (f) *Shepherd v. Keasley*, (g) and *Jones v. Flint*, (h) If the subject of the contract had been a share of a trade or business carried on

(a) 1 Com. Rep. 354.

(b) 5 Ves. 308.

(c) 2 Y. & Coll. 268.

(d) 3 M. & W. 422.

(e) 1 Coll. 381.

(f) 5 Beav. 433.

(g) 1 Cr., M. & Ros. 117.

(h) 10 Ad. & Ell. 753.

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[*50] in Fleet-street, *as, for example, in the Law Life Assurance Society, the contract would not throw on the vendor the necessity of showing the title of the company to the house in which the business was carried on. It might be said that the particular house in that case was not essential to the business,—it might be carried on elsewhere; but that was not the distinction. It would be the same in the case of a dock company. Suppose the contract had been for the sale of shares in the St. Katharine or the Southampton docks, the vendor could not be required to show how the company had become possessed of the site of their docks, or what was the duration of their title; this exemption did not depend upon the act of Parliament for constructing such works,—for those acts were not public general acts, which all were bound to know, but were local only. In the coal districts, several railways had been made entirely by contract with the land owners, without any act of Parliament; if the contract had been for shares in a railway so constructed, could it be said that the vendor must show a valid title to every parcel of land over which it passed?—and yet a failure of a title in any part might interrupt the whole progress of the railway. The same might be said of an interest in a brewery. The question in all cases was, what to common intent was the subject of the contract. The exigencies of commerce had, in this country, rendered property transferable in a form not contemplated by the earlier law, and the courts of justice had always taken notice of and given validity to such contracts, according to the course of mercantile dealings.

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*FITCH vs. WEBER.

[*51]

1847: Dec. 4th, 6th, and 11th.

A., who was by birth an Englishman, emigrated to the United States of America after the recognition of their independence by the Treaty of 1783, and took the oaths of obedience to the American Government, and of abjuration of all other allegiance,—married an American woman, and had a son of that marriage (B.) born in the United States. B. had a son (C.,) who was also born in America, out of the Queen's dominions:—*Held*, that C. was capable of inheriting real estate as a British subject within the statutes 13 Geo. 3, c. 21, and 4 Geo. 2, c. 21.

The abjuration by a British subject of his allegiance to the Crown, and his promise of obedience to a foreign state, although it might have rendered him liable, under the statute 3 James 1, c. 4, ss. 22, 23, to the penalty of high treason, does not therefore disqualify the children of such British subject from inheriting, in the absence of any attainder of such British subject by judgment, outlawry or otherwise.

The exclusion from the benefits of the statute 4 Geo. 2, c. 21, s. 2, of the children of fathers who at the time of their birth, were liable to the penalties of high treason or felony in case of the returning into this kingdom or Ireland without the royal license, is not to be construed as requiring the Court to determine incidentally, and in the absence of the party charged, that he has been guilty of treason or felony; but the exclusion must be construed as restricted to that class of offences in which the penalty is annexed to the fact of returning without license.

The privileges which the statutes 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, confer are the privileges of the children, and not of the father; and, therefore, acts intended by a British born subject to have the effect of acts of abandonment or abjuration of his rights in that character do not deprive his children of the benefit of the statutes of the 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, unless such acts bring them within the disqualifying provisions of those statutes.

A person claiming the benefit of the statute 13 Geo. 3, c. 21, does not lose that benefit only because he does not conform or qualify in the manner prescribed by sect. 3 of that statute, within five years from the accruer of his right or interest.

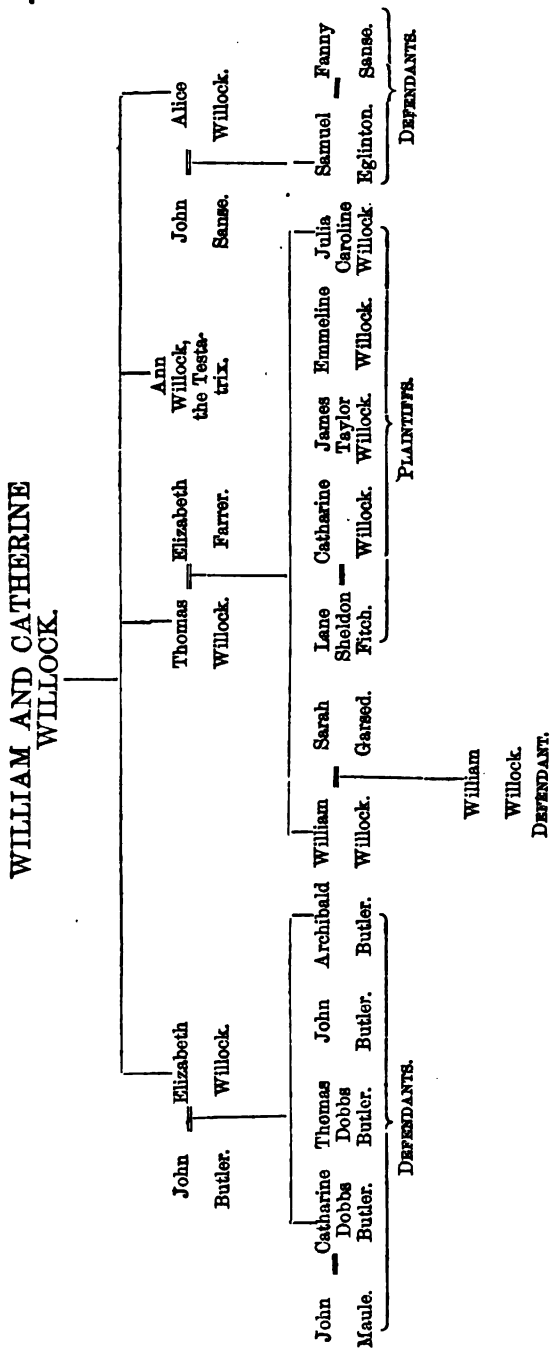
THE decree made at the hearing of this cause in 1841, directed the Master to inquire who was or were the heir-at-law or co-heirs-at-law of the testatrix, Anne Taylor, living at her death, with liberty to state special circumstances relating thereto.

The Master reported, that several claims to be the heir or co-heirs had been made before him:—1st, that of the defendant, William Willock, who claimed to be heir-at-law; 2nd, that of

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the plaintiff, James Taylor Willock, who claimed to be heir-at-law in the event of the defendant, William Willock, failing to establish his said claim ; 3rd, that of all the plaintiffs, (namely, Catherine Fitch, James Taylor Willock, Emmeline Willock, and Julia Caroline Willock,) who claimed to be deemed and considered co-heirs in the event aforesaid ; and, 4th, that of the defendants, Thomas Dobbs Butler and Fanny Eglinton, who claimed to be such co-heirs.

The Master stated the pedigree, which, so far as relates to the several parties claiming to be heirs or co-heirs of Anne Taylor, is represented in the following table :—



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[*53] *The Master by his report, found, that the defendant, William Willock, was the heir-at-law of the testatrix, Anne Taylor, living at her death. And he found that a statement had been laid before him on behalf of the defendants, Thomas Dobbs Butler and Fanny Eglinton, in respect of the claim of the defendant, William Willock, as heir-at-law of the testatrix, wherein it was alleged that Thomas Willock, the grandfather of the defendant, William Willock, the claimant, did in or about the year 1784, quit England, and emigrate to the United States of America; that he made his domicile in Norfolk county, in the state of Virginia, in the said United States, and did not retain a domicile in this country; that he married a native of Norfolk county, and did all necessary acts whereby to become naturalized as a citizen of the United States, and that he did accordingly become naturalized; that William Willock, one of the children of the said Thomas Willock, was born in Norfolk county aforesaid, and that the said defendant, William Willock, the claimant, was born in the island of Cuba; and it was by such statement submitted to him, that, under the circumstances aforesaid, the said Thomas Willock ceased to be a subject of the crown of Great Britain, and was not a subject of that crown at the time of the birth of any or either of his children, and that such children were not and are not children of a natural-born subject of Great Britain within the intent and meaning of the acts of Parliament in that case made and provided, and are, therefore, aliens, and incapable of inheriting real property in the kingdom of Great Britain.

The Master also reported, that a statement had been laid before him, on the behalf of the defendant, William Willock, in respect of his claim as heir-at-law of the said testatrix, whereby [*54] it was stated, that, in *pursuance of the provisions of an act of Parliament, made in the 13 Geo. 3, (c. 21,) the said defendant, William Willock, some time in the year 1846, left New York, in the United States of America, where he was previously residing, for the purpose of removing to the kingdom of Great Britain, and that he arrived in England in the month of June, 1846, and had continued to inhabit and reside there up to

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the present time; that, on the 8th day of November, 1846, he received the Sacrament of the Lord's Supper according to the usage of the Church of England, and, on the 21st day of November, 1846, took and subscribed the oaths, and made, repeated, and subscribed the declaration required by the provisions of an act of Parliament made in the first year of Geo. 1, (c. 13;) and that, at the time and place of taking and subscribing the said oaths, and of making, repeating, and subscribing the said declaration, he produced a certificate signed and attested, as by the provisions of the last-mentioned act are required, of his having received the Sacrament of the Lord's Supper as aforesaid. And the Master stated the evidence submitted in support of the said statements.

The defendants, Thomas Dobbs Butler and Fanny Eglinton, who claimed to be co-heirs of the testatrix through her sisters Elizabeth and Alice, and the plaintiff James Taylor Willock, the second son of Thomas Willock, severally excepted to the report.

Mr. *Rolt* and Mr. *Roundell Palmer* appeared in support of the exceptions of Thomas Dobbs Butler and Fanny Eglinton; Mr. *Walker* and Mr. *Hardy* for the exceptions of James Taylor Willock; and Mr. *Wood* and Mr. *Rogers* for William Willock, in support of the Master's report.

*The arguments in support of the exceptions, so far as [*55] the reporter has been able to collect them, were these:—The father of the claimant, found by the Master to be the heir-at-law, and the claimant himself, were both born in a foreign country. The father lived and died there, and the claimant, up to a very recent period, has always lived there. The Court has to apply the law of alienage to this state of things. The common law may be taken to be expressed by Littleton, s. 198,—“an alien, which is born out of the allegiance of our sovereign lord the king.” This being the principle, and the claimant (as well as his father) having been born out of the King's allegiance, it lies upon the claimant to show some statute by which he is relieved from the effect of his alien character. The first statute on

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the subject is the 25 Edw. 3, stat. 2, which prevents mere birth out of the King's allegiance from depriving a child of his benefits as an English subject where both the father and mother, at the time of the child's birth, were of the faith and allegiance of the King, the mother not being abroad against her husband's will. This statute does not assist the claimant. Neither his mother nor his grandmother were subjects of the King. The next statute (7 Anne, c. 5) was made for the naturalization of foreign Protestants; but the same statute (sect. 3) gives to the children of all natural-born subjects, born out of the Queen's allegiance, the rights of natural-born subjects of this kingdom. The other parts of this statute were repealed by the statute 10 Anne, c. 5; and the 3rd section of the statute 7 Anne, c. 5, was explained and qualified by the statute 4 Geo. 2, c. 1. By that act all children born or to be born out of the King's allegiance, whose fathers were or should be natural-born subjects of the Crown of England at the time of the birth of such children, were declared to be natural-born subjects of the Crown; but this was accompanied [56] with the proviso, that the benefit *of the statute should not extend to children to be born out of the King's allegiance whose fathers, at the time of the birth of such children, should be attainted of high treason, or be liable to the penalties of high treason or felony in case of their returning into this kingdom without licence from the Crown, or whose fathers should be in the actual service of a foreign state at the time of the birth in enmity with the Crown of England, all such children being left to the effect of the common law. The benefits of the statute of Geo. 2 were extended by the statute 13 Geo. 3, c. 21, to all persons born or to be born out of the King's allegiance whose fathers were, or should be, under the statute 4 Geo. 2, c. 21, declared to be natural-born subjects of the British Crown, and all such persons were thereby declared to be natural-born subjects as if they had been born in this kingdom. It followed, first, that, upon these statutes, and the principle of the common law, those who claimed the benefit of the provisions in favor of persons born abroad ought to show that they had, at least, accepted the benefit; while, in this case, on the contrary, all the acts of Thomas Wil-

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lock, the person in favor of whom the character of a natural-born subject was claimed, (in order to admit the claim of his descendants,) manifested an intention to abandon and repudiate the advantages which the statute offered him. Thomas Willock took the oath of allegiance to the Government of the United States, and thereby expressly renounced and abjured his allegiance to the Crown of Great Britain. He did every act necessary to constitute him an American citizen; he married a native and subject of that foreign state; he held civil offices, and served in the militia of that country; he was domiciled there during the war with England in 1813, and he died there. It was impossible to imagine a more perfect abandonment of the privileges of a British subject. Nor could it be reasonably contended, *that a statute passed in this country could have the effect [*57] of rendering his children, who were born in a foreign country, British subjects contrary to the whole tenor of his acts and intentions. Secondly, it was insisted that the effect of the treaties between this country and America was to absolve Thomas from his allegiance to the British Crown. The treaty of 1783 dissolved the ties of allegiance which had formerly subsisted between the inhabitants of what constituted British America and the sovereign of this country; *Doe v. Acklam*, (a) and the claimant William Willock is not within the treaty of 1794: *Sutton v. Sutton*, (b) *Doe dem. Stanbury v. Arkwright*, (c) Thirdly, if Thomas was not absolved by the effect of the compact between the two countries, the acts which he had done had made him liable to the penalties of high treason in case he had returned to England without licence. The oath of obedience to the United States, and the solemn renunciation and abjuration of his allegiance to this country by Thomas Willock, brought him strictly within the statute 3 Jac. 1, c. 4, ss. 22, 23, whereby promising obedience to any other prince, state, or potentate subjected the person so doing to be adjudged a traitor, and to suffer the penalty of high treason. The liability of such penalty excluded the party from the benefit of the statute of 4 Geo. 2, and of the subsequent statute. And,

(a) 3 B. & C. 779.

(b) 1 Russ. & Myl. 663.

(c) 5 Car. & Pa. 575.

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(a) 2 V

(b) 1 Russ. & Myl. 663.

(c) 5 Car. & Pa. 575.

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(a) 2 B. & C. 779.

(b) 1 Russ. & Myl. 663.

(c) 5 Car. & Pa. 575.

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lastly, even if it could be held, that Thomas had neither effectually thrown off his allegiance, nor become liable to the penalty of treason, still he would, by his conduct, have forfeited all right to be deemed a British subject: *Calvin's case*, (a) *Drummond's case*. (b) If William Willock, the claimant, had, in a period of war, been taken in arms against his country, there was no principle [*58] of *international law upon which he could be regarded as a British subject.

On behalf of the plaintiff, James Taylor Willock, in support of his exception, it was said that William Willock had not perfected his title by conforming, according to the statute 13 Geo. 3, c. 21, s. 3, within five years from the time the title accrued, and that, owing to such omission, the estate would descend on the next heir-at-law of the testatrix not disqualified.

The arguments in support of the report may be understood from the judgment; several authorities were cited, and, in particular, as to the construction to be given to the words "any other prince or state," in the statute 3 Jac. 1, c. 4, ss. 22, 23; 4 Black. Com. pp. 87, 88. The statute 9 & 10 Vict. c. 59, repealing the statute 3 Jac. 1, c. 4; Foster's Cr. Law, Macdonald's case, p. 59; Id. 183. And, as to conditions which the party has during his life to perform, Co. Litt. 208, b., 209, a.

VICE-CHANCELLOR:—The Master has found, that William Willock, the grandson of Thomas, who was the only brother of the testatrix, Anne Taylor, who left any issue, was the heir-at-law of the testatrix living at her death; and according to the pedigree, the correctness of which is not in dispute, there is no question but that the Master is right. The question raised by the exceptions has been, whether, in the circumstances of the case, the status of Thomas, of William the son, and of William the grandson, were such as to incapacitate William the grandson from taking by descent from Anne Taylor.

[*59] *The exceptants are, first, the descendants of two sisters of Anne Taylor, who claim to be her co-heirs on

(a) 7 Rep. 1.

(b) 2 Knapp, P. C. C. 295.

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the exclusion of the descendants of Thomas the brother; secondly, the second son of Thomas the brother, who claims to be admitted as the heir-at-law of Anne Taylor, if for the reason which he assigns the son of the eldest son of Thomas should be excluded.

The argument against the claim of William the grandson, which I shall first notice, is that which was founded upon the two treaties between this country and America, namely, the treaty of the 3rd of September, 1783, and that of the month of November, 1794. I am clear there is nothing in either of those treaties to affect the right of William the grandson. The treaty of 1783 empowered British-born subjects then settled in America to become American citizens. It did not empower British-born subjects who never had previously been in America to emigrate there at any time thereafter, and throw off their natural allegiance to the Crown of these realms. On this point the case of *Doe d. Achmuty v. Mulcaster*(a) is an authority. Thomas Willock never was in America until 1784, and therefore was not a subject of the treaty of 1783. The treaty of November, 1794, so far as it empowered British-born subjects to become American citizens, was a local act, and Thomas Willock was not within the localities affected by that treaty. The correctness of the Master's conclusion must therefore depend upon the statutes which were referred to during the argument; the statutes of the 7th of Anne, c. 5; the 4th of Geo. 2, c. 21; and the 13th of Geo. 3, c. 21.

Thomas Willock, as I have before observed, went *to [*60] America in 1784, and his son and grandson were both born there—the son in 1788. The son not having been born within the King's allegiance, his capacity to take by descent depends upon the statute of 7th of Anne, c. 5, explained by the 4th of Geo. 2, c. 21. Now by the former statute (s. 3) it is declared that all the children of natural-born subjects born out of the allegiance of her Majesty, her heirs and successors, shall be deemed, adjudged, and taken to be natural-born subjects of this

(a) 5 B. & C. 771.

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kingdom, to all intents, constructions, and purposes whatsoever. The statute of the 4th of Geo. 2, c. 21, explaining that of Anne, requires that the fathers of the children entitled to the benefits of the act shall be natural-born subjects of the Crown of England or of Great Britain at the time of the birth of such children respectively. The only question, therefore, up to this point in the case would be, whether, in 1788, at the time of the birth of William, the son of Thomas, Thomas had ceased to be a natural-born subject of the Crown of England or of Great Britain. The next statute is that of the 13th of Geo. 3, c. 21, which provides that all persons born, or who should thereafter be born out of the allegiance of the Crown of England or of Great Britain, whose fathers were or should be "by virtue of the statute of 4th Geo. 2, made to explain a clause in the act of the 7th of Anne," entitled to all the rights and privileges of natural-born subjects of the Crown of England or Great Britain, "shall and may be adjudged and taken to be, and are thereby declared and enacted to be natural-born subjects of the Crown of England or Great Britain, to all intents, constructions, and purposes whatsoever, as if he and they had been and were born in this kingdom." From the language of this act, it is clear that the capacity of William, the grandson, to inherit depends upon the

[*61] question, whether William the son at the time of his birth was entitled to the rights and privileges of a natural-born subject to the Crown of England or Great Britain by virtue of the statute of Geo. 2, made to explain the clause in the statute of Anne relating to natural-born subjects.

The inquiry, then, as to the capacity of William the grandson must be answered by transferring the inquiry in the first instance to the capacity of William the son. Was he entitled at his birth to the rights and privileges of a natural-born subject of the Crown of England or Great Britain,—not generally, but by virtue of the explanatory statute of Geo. 2? And here the first question is, as to the disqualifications expressed in the 2nd section of the 4th of Geo. 2. Those disqualifications are three; and they extend, first, to children whose fathers at the time of their births respectively were or should be attainted of high treason, by judgment,

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or outlawry, or otherwise, either in this kingdom or in Ireland; secondly, children whose fathers at the time of the birth of such children respectively were or should be liable to the penalties of high treason or felony, in case of their returning into this kingdom, or into Ireland, without the license of his Majesty, his heirs or successors, or of any of his Majesty's royal predecessors; and, thirdly, to children whose fathers at the time of the birth of such children respectively were or should be in the actual service of any foreign prince or state then at enmity with the Crown of England or Great Britain. The first and third of these disqualifications give rise to no question in this case. There was no attainder by judgment, or outlawry, or otherwise, and there was no service by Thomas Willock with any foreign prince or state at enmity with the Crown of England.

*With respect to the second ground of disqualification, [*62] I think it was well argued on the part of William the grandson, that the words of the 2nd section, "in case of their returning into this kingdom, or into Ireland, without the licence of his Majesty," &c. are emphatic and restrictive, and clearly point at a known class of offences,—that of returning under certain circumstances into this kingdom or Ireland without the licence of the Crown.. The fact that such a distinct class of offences existed, and that it subjected the offenders to the penalties of treason or felony, is sufficient, in my opinion, to induce any court of justice to restrain the words of the statute within the limits contended for. No construction of a statute can be more improbable than that which requires courts of justice to determine, incidentally and in the absence of the party charged, that he had actually been guilty of treason or felony, without ever having come into the kingdom.

An argument of another kind, however, was resorted to. It was said that Thomas Willock, under the circumstances found by the Master, had solemnly abjured his allegiance to the Crown of Great Britain, and had by his acts become an American citizen; and that he had therefore ceased altogether to be a subject of England or of Great Britain before the birth of his son William in 1788.

 1847.—Fitch v. Weber.

I think this argument is fallacious. The privilege conferred by the statutes in question upon the children of natural-born subjects, born out of the king's allegiance, is the privilege of the children and not of the father, and is conferred upon the children for the benefit of the state. If the parents do an act which brings them within the disqualifying provisions of the [*63] *statute, the children, no doubt, may lose the rights and privileges otherwise conferred upon them by the statute. The father may do acts short of this, by which he may subject himself to penalties or forfeitures. But if the question be, whether by the acts of the father the children have lost the rights and privileges conferred upon them as the children of the natural-born subject of England or Great Britain, it is not enough to show that the father has done an act which he may possibly have intended should have a given effect,—it must be shown that, by the laws of these realms, such act of the father had the effect which the argument ascribes to it; and without that I apprehend the rights and privileges of the children will be unaffected by the acts of the father.

Now nothing, I apprehend, can be more certain than that a natural-born subject cannot throw off his allegiance by any such acts as the Master has found in this case to have been done by Thomas Willock. I do not deny that Thomas Willock may have subjected himself to pains and penalties; but that is not the question. The question is upon the rights and privileges of the children; and whilst the obligation of allegiance as a subject remained upon the father, I cannot understand how the rights or privileges of the children would be affected by the acts relied upon.

I am now called upon to say how far an act of the Legislature of Great Britain can for all purposes make a man born out of the king's allegiance a British born subject against this will. All that I am called upon here to decide is, that a man entitled under the statutes in question to the right and privileges of a British born subject, cannot be deprived of those rights [*64] *and privileges by such acts of his father as have been relied upon in the present case.

1847.—Fitch v. Weber.

With regard to the effect of the statute of the 3rd of James 1, c. 4, ss. 22, 23, there is no doubt that it creates an offence; but in the absence of attainder by judgment, outlawry, or otherwise, the case falls under the observations I have already made. This appears to me, in substance, to dispose of the question as between the descendants of the sisters of Ann Taylor and William the grandson of Thomas.

It was, however, contended, upon an exception on the part of James Taylor Willock, the second son of Thomas Willock, that he must be preferred to William the grandson. The ground of this exception was, that William the grandson had not, within five years from the time of the accruer of his title, qualified himself by receiving the sacrament, taken the oaths, and conforming in the way which is required by the statute of the 13th of Geo. 3. The question made was, whether those qualifying acts could be well performed after the five years had expired.

It appears to me, that it is impossible to read the act and not to see that a reasonable time must be allowed after the accruer of the title before the party can be required to do the acts referred to. The meaning of the statute cannot be, that the party shall have done them in the lifetime of the person upon whose death the title accrued. If a reasonable time is allowed, the case is then brought within the reasoning of Lord Coke, and of the other authorities cited, where the party, being in other respects entitled to the estate, has time allowed him, within which the acts necessary to perfect *his title are to be done. It [*65] is not necessary to decide whether a party, whose title depends upon the provisions of the statute of Geo. 3, could claim the judgment of the Court in his favor before he had qualified in the manner which the act prescribes. The Master finds that the qualifying acts in this case have been done. Upon this point it may also be observed, that if a party be entitled under the statutes to all the rights and privileges of the natural born subjects, the question as to the acts which he should do to give him a better qualification cannot arise.

I think the Master has come to the right conclusion, and the exceptions must be overruled.

1847.—Plunkett v. Lewis.

PLUNKETT v. LEWIS.

1847: Jan 27th.

Deeds brought into Court by the executor under the common order for production of documents made in a creditor's suit, will, after the debts are paid, be ordered to be delivered out to the party by whom they were deposited; and the Court refused to order such deeds to be delivered to the plaintiff in the cause, although he was the tenant for life of the estate comprised in the deeds.

IN the suit for the administration of the estate of Lyndon Evelyn(a) the title deeds of the estates comprised in the settlement of the 28th of December, 1838, and thereby conveyed to the use of Lyndon Evelyn for his life, with remainder to the use of the plaintiff for his life, with other remainders over,(b) were brought in and deposited under the common order for production. The plaintiff now applied, by petition, that the deeds might be delivered out to him, as the next tenant for life of the estate.

Mr. Romilly and Mr. Calvert, for the petitioner, cited [*66] *Webb v. Lord Lynton,(c) Duncombe v. Mayer,(d) and said that the deeds in question were not brought into Court for safe custody: 2 Sugd. V. & P. 110, ed. 10, was also mentioned.

Mr. Kenyon Parker, who appeared to oppose the petition, was not heard.

THE VICE-CHANCELLOR said, that the order could not be made in this suit. It was a creditor's suit, and so soon as the debts were paid, the suit, so far as concerned the plaintiff, was at an end. The court would only deliver the deeds out to the party who had deposited them.

(a) See 3 Hare, 316, 320.

(b) Id. 318.

(c) 1 Eden, 8.

(d) 8 Ves. 520.

 1847.—Wolfe v. Findlay.

WOLFE v. FINDLAY.

1847: Jan. 20th.

A firm in India collected the estate of a deceased person, in that country, under a power of attorney from the administratrix in England, and remitted the amount to their agents, a firm in London, with an order to pay it to the administratrix upon receiving a proper discharge. The London firm declined to pay over the fund to the administratrix, on the ground that the letters of administration which she had obtained did not bear a sufficient stamp. A suit was soon afterwards instituted by other persons, claiming to be next of kin of the intestate, for the administration of the estate, and to restrain the payment to the intestate. The London firm were defendants to the suit. No application was made to pay the money into Court for upwards of ten years, and during the whole of this period it remained in the hands of the London firm, mixed with their own moneys:—*Held*, that the London firm was not liable to pay interest on such moneys.

W. D. PARKINS, the intestate in this cause, died on his passage from India to England in the year 1825. Letters of administration of his estate were procured by Isabella Findlay, the wife of George Findlay, from the Prerogative Court of Canterbury. In pursuance of a direction to that effect, accompanied by a power of attorney from the administratrix, Messrs. Colvin & Co: of Calcutta, collected the assets of the intestate in India, *and they then remitted the amount to their agents in [*67] London, Messrs. Bassett & Co., who were represented in this suit by the defendants, W. Crawford and J. Colvin. Messrs. Bassett & Co., on receiving the money, amounting to about 2000*l.*, from India, declined to pay it over to Isabella Findlay, the administratrix, until she produced letters of administration bearing a probate stamp sufficient to cover the amount; but they advanced to her 100*l.* for the purpose of paying the proper stamp duties. In the month of March, 1830, while the money was still in the hands of Messrs. Bassett & Co., a bill was filed by other persons, claiming to be next of kin of the intestate, against the administratrix and her husband, and also against Messrs. Bassett & Co. The bill prayed an account of the personal estate of the intestate; an injunction, on the ground of the alleged insolvency of the administratrix, to restrain her from interfering with the estate, and

1847.—Wolfe v. Findlay.

Messrs. Bassett & Co., from paying over to her the money in their hands; and for a receiver. The injunction was granted.

The answer of Messrs. Basset & Co., in the suit of 1830, stated that the sum of 1985*l.* 9*s.*, the assets of the intestate, had been remitted to them by Messrs. Colvin & Co. in two bills of exchange, which became due in November, 1829, and which remittance had been accompanied by directions to pay over the proceeds to the administratrix of the said W. D. Parkins, upon having a proper discharge for the same; that it appeared to them the letters of administration which had been granted to the administratrix did not, for want of a sufficient stamp, enable her to give a discharge to the defendants (Basset & Co.), and to the said Messrs. Colvin & Co., and they (the defendants) had therefore

refused to pay over the amount of the bills to the admin-
[*68] istratrix; *that in order to enable the said George Find-

lay, and Isabella his wife, to pay the stamps upon proper letters of administration, they advanced to them, at their request, the sum of 100*l.* for that purpose; that, after deducting the sum payable to the defendants as East India agents by way of commission in respect of the said bills, amounting to 30*l.* 11*s.* 6*d.*, and the said 100*l.*, they were ready to pay the balance into Court, or to dispose of the same as the Court should direct, upon being indemnified, and paid their costs. The suit afterwards abated, and the proceedings remained in the same state until the year 1841, when a bill of revivor and supplement was filed, and an order was made for the payment of the balance into Court, without prejudice to any question as to interest thereupon. Inquiries were also directed as to the next of kin of the intestate; and the Master having made his report, the cause now came on for further directions.

Mr. Romilly and Mr. Hubback for the plaintiffs, and Mr. Bagshaw, Mr. Malins, Mr. Willcock, and Mr. Moxon for defendants interested in the estate of the intestate, contended that it was the duty of Messrs. Bassett & Co. to have obeyed the directions under which the money had come to their hands. They were informed that it was received by their Indian correspondents by virtue

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of a power of attorney which Mrs. Findlay had given them. The person, therefore, to give the discharge was Mrs. Findlay, their principal. If they had apprehended any danger in paying the money to her, they might, after the institution of the suit, have discharged themselves of the fund by paying it into Court to the credit of the cause. Bassett & Co. knowing the fund consisted of trust money, kept it in their hands, undistinguishable from *their own moneys; and they were, therefore, liable to ac- [*69] count for interest upon it: *Broune v. Southouse*,(a) *Treves v. Townshend*,(b) *Perkins v. Baynton*,(c) Treating it as a simple contract debt, they were also liable to pay interest: *Arnott v. Redfern*,(d)

Mr. Wood and Mr. Goldsmid for the defendants, W. Crawford and J. Colvin, submitted that Messrs. Bassett & Co. were merely the bankers in the transaction. It was no part of their duty to apply to the Court for an order to pay the money into Court. They were ready to pay over to any person competent to give them a discharge, or as their correspondents in India should direct: *Lord Chedworth v. Edwards*,(e) *Edwards v. Vere*,(f) *Higgins v. Sargent*,(g)

The VICE-CHANCELLOR:—I do not think that the fact of Messrs. Colvin & Co., the Indian house, having departed from the authority which they had originally received from Mrs. Findlay, can affect the London house of Messrs. Bassett. The fund was remitted to the latter house from the former, accompanied by a direction to apply it in a particular manner, and the London house was bound to comply with that direction. Their instructions were to pay it to the person who could give a legal discharge, and such payment must of course be preceded by a demand by the person so entitled. No such demand was, however, made, for Mrs. Findlay was not the party entitled to receive the money. There is no rule of law which could render the agent liable for interest until demand of the principal

(a) 3 Bro. C. C. 107.

(b) 1 Bro. C. C. 384.

(c) Id. 375.

(d) 3 Bing. 353.

(e) 8 Ves. 48.

(f) 5 B. & Ad. 282.

(g) 2 B. & C. 348.

1847.—Wolfe v. Findlay.

[*70] *had been made. Supposing the delay to have arisen from the neglect of a duly qualified administrator, although such administrator might be liable to those to whom he is accountable, it by no means follows that the agent will be liable to him.

It has been said, that the defendants ought to have paid the money into Court. The bill was filed for an injunction to restrain them from paying it over to Mrs. Findlay. No order was made directing Messrs. Bassett to pay the money into Court, although the plaintiffs might have applied for such an order if they had been so advised. In that suit there was, at that time, no properly constituted personal representative; and it is impossible to say, that a party is chargeable with default for not having brought money into Court in a cause so constituted.

The question is, what are the liabilities incurred by the London house in consequence of the undertaking they had come under? that undertaking was to pay over the money upon demand to the party entitled, and to do that they were bound to have the money ready. If they had invested it even in those securities which are recognized by the Court, a fall in the funds would have been no answer to the party applying for the full amount of the remittance; and it does not appear to me, that the parties in the cause can have any right greater than that which the administratrix herself would have had against the London house. In a case like the present, where there was no administrator of the intestate, and no hand to receive the money until the year 1842, I think the defendants, Crawford and Colvin, cannot be held liable for interest upon the fund transmitted to them and left in their hands.

1847.—Hughes v. Williams.

*HUGHES v. WILLIAMS.

[*71]

1847: Feb. 24th.

An order made by the Master, although obtained irregularly, and *ex parte* as to some of the parties in the cause, cannot be treated by them as a nullity; and therefore where one defendant had without notice to his co-defendants, obtained an order from the Master to enlarge publication, and before the enlarged time expired, another defendant knowing of the order, set down the cause for hearing; the cause was ordered to be struck out of the register's book, with costs to be paid by the defendant who had set it down.

PUBLICATION in this case, which would have passed on the 6th of November, had been enlarged for a further time, which expired on the 7th of January. On that day, Lawrence, one of the defendants, served the plaintiff with a warrant to attend the Master, for the purpose of obtaining further time, by again enlarging publication; and on the 11th of January the Master enlarged publication until the 20th of February. The other defendants were not served with the warrant, but were on the 18th of January informed of the order made by the Master on the 11th of January. The other defendants replied that they were not bound by the order, and that against them publication had passed. Lawrence's witnesses were afterwards examined, and were cross-examined by the plaintiff. Between the examination and the cross-examination the other defendants set down the cause for hearing, under the General Order CXVI., of May, 1845, and served the plaintiff with the subpoena to hear judgment.

Mr. Wood and Mr. Shapter, for the plaintiff, moved that the cause might be ordered to be struck out of the Registrar's book, as having been improperly set down before publication had passed, and that the subpoena to hear judgment issued in the cause, together with service thereof respectively, might be set aside, and that either the defendants at whose instance the cause had been set down, or the defendant Lawrence, might pay the costs of the application. They did not dispute that the Master had

 1847.—Hughes v. Williams.

no jurisdiction to make the order of the 11th of January, [*72] *Carr v. Appleyard*, (a) or that if he *had jurisdiction, the order was irregularly obtained, owing to the omission to serve the other defendants with the warrant: *Brydges v. Branfill*, (b) The order, however, had been made, and under that order, until it was set aside, the plaintiff was bound to act: *Chuck v. Cremer*, (c) It was impossible he could bring the cause to a hearing with a partial publication. The present motion, therefore, was necessary.

Mr. *Freeling*, for the defendants who had set down the cause.—These defendants were entitled to treat the order of the 11th of January as a nullity, for the two reasons which had been mentioned—the want of jurisdiction, and the proceeding *ex parte*. They had accordingly disregarded what had been done before the Master in their absence, and had set down the cause, not as between the plaintiff and all the defendants, but only as between the plaintiff and themselves. The plaintiff had the conduct of the cause, and if any irregular step was taken by other parties, it was for the plaintiff, and not for defendants, to apply to the Court to relieve himself from the consequence of such irregularities.

Mr. *Chandless*, for the defendant Lawrence, submitted that he was entitled to his costs of the motion; his order was either a valid order or a nullity. If valid, he ought not to be subjected to the costs; if a nullity, it was not necessary to serve him with the notice of motion.

VICE-CHANCELLOR:—I do not think it is material for the purpose of this motion to determine whether the order [*73] made by the *Master, on the 11th of January, was or was not regular, and within his jurisdiction; and I certainly cannot enter into the question, whether the irregularity of the order

(a) 2 Myl. & Cr. 476.

(b) 9 Sim. 643.

(c) 2 Phil. 113.

 1847.—*Lander v. Ingersoll*.

was more or less obvious. Here is an order, of which, on the 18th of January, these defendants had notice; and until they set aside that order, they must respect it.[1] The solicitor of a party in a cause is not to act upon his own opinion of the validity of an order made by any judge of the Court.

It was not necessary to serve the defendant Lawrence with the motion. It is true he obtained the order, but that order is good until it shall be set aside; and the plaintiff is not now moving to set it aside, but is proceeding upon it as a valid order. As Lawrence is unnecessarily brought here, the plaintiff must pay his costs. I make the order, with costs (excepting those of Lawrence,) to be paid by the defendants who set down the cause.

— .
 Affirmed by the LORD CHANCELLOR, on appeal, 26th of March, 1847.

LANDER v. INGERSOLL.

1847: 24th Feb. and 4th March.

A defendant against whom the bill has been dismissed with costs, to be paid by the plaintiff, and received by the plaintiff out of the estate to be administered in the cause, is not bound to serve the parties interested in the estate with a warrant to attend the taxation, but may proceed with the taxation, serving the plaintiff only with the warrant.

At the hearing of the cause the bill was ordered to be dismissed with costs, as against one of the defendants, such costs to be paid by the next friend of the *plaintiffs in the cause, [*74] who was to recover them over, from the estate. The costs of the defendant, who was dismissed, were accordingly taxed, warrants to attend such taxation having been served on the plaintiffs only. After the Master had made his certificate of the amount,

[1] *Gould v. Root*, 4 Hill, 554. But if an order be granted by an officer having no jurisdiction, it may be disregarded. *Spencer v. Barber*, 5 Hill R. 568.

 1848.—*Lander v. Ingersoll*.

Mr. *Collins*, for the defendants interested in the estate, moved that the certificate might be taken off the file, and a reference directed to the Master to re-tax the costs. He submitted that the defendants, who were entitled to four-fifths of the estate, ought to have been parties to the taxation; and that, as they were not served with the warrants, the certificate was irregular.

Mr. *Koe* and Mr. *Cairns*, contra.

The VICE-CHANCELLOR, after communicating with the Taxing Masters, said, that he understood that it was usual to require service of the warrants to attend taxation of costs on the parties beneficially interested in the fund by which the costs were to be borne; but where costs were ordered to be paid to a defendant by a plaintiff, it was not strictly necessary that the defendant should serve any party other than the plaintiff. He would, for the purpose of trying the present motion, assume that the other defendants, or the funds in which they were interested, were not liable to pay or bear the costs which had been taxed, unless they had been served with warrants for taxation, and that if these parties should think proper hereafter to challenge the correctness of the certificate, they would not be bound by it;—he would assume this to be so, without expressing any opinion upon [*75] the point;—still the party who *was, under the decree of the Court, entitled to receive the costs from the plaintiff, had nothing to do with the ultimate liabilities of the other parties. It was sufficient for him to serve the plaintiff, by whom he was to be paid.

Motion refused, with costs.

1847.—Batchelor v. Middleton.

BATCHELOR v. MIDDLETON.

1847: 23rd, 24th, and 25th Feb.; 5th March. 1848: 8th Feb.

In 1816, the mortgagee, under a mortgage created some years before, entered into possession of the mortgaged premises, and in 1827 he executed a transfer of his mortgage to another. The transferee thereupon entered into possession, and in 1828 executed a transfer of his mortgage to a second transferee who then entered into possession. The mortgagor was not a party to either transfer, and had not, from the time the original mortgagee entered into possession, received any acknowledgment in writing of his equity of redemption. In 1833, the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 28) was passed and barred all suits for redemption after twenty years' possession by the mortgagee, and no acknowledgment in the meantime of the right of redemption given to the mortgagor or his agent, in writing, signed by the mortgagee. In 1845, the representative of the mortgagor filed his bill for redemption against the representatives of the second transferee:—*Held*, that the statute operated retrospectively, by taking from the mortgagor the benefit of the acknowledgment which had already been made of the mortgage title in the transfers of 1827 and 1828; and that the suit (as to that estate) was therefore barred.

In a suit by the devisee of a mortgagor to redeem the mortgaged estate, where the defendant, the alleged mortgagee, claims an absolute title by virtue of the Statute of Limitations, legatees whose legacies are, under the will of the mortgagor, charged on the mortgaged premises, are necessary parties.

A plaintiff suing in forma pauperis, brought his bill to redeem two estates, but was held to be entitled to redeem one estate only, and the mortgagee was allowed to add his costs of the suit, in respect of both estates, to the principal and interest due to him on the security of the redeemable estate.

JOHN BATCHELOR the elder, the mortgagor of two estates at Temple Tysoe, in Warwickshire,—the first originally demised by a mortgage deed of 1798, and the second by a mortgage deed of 1799, devised his estates (subject to the mortgages, and subject also to several legacies to his younger children) to the plaintiff, his eldest son, and died in 1813. Other incumbrances and charges had been made on both estates; but it will be sufficient for the statement of the principal point in this case to say, that, at the death of the mortgagor, John Baskett was the mortgagee of the first (1798) estate, under a mortgage-deed made in April, 1806, and Samuel Blencowe of the second (1799) estate, under a mort-

1847.—Batchelor v. Middleton.

gage made in 1802. The second estate was also subject to a subsequent mortgage for 300*l.* to Daniel Warren.

In 1816, John Baskett, the mortgagee, entered into possession of the first (1798) estate, and continued in [*76] possession down to the 3rd of June, 1826, when 782*l.* 4*s.* 3*d.*, the amount due upon that security, according to an account then prepared, was paid to John Baskett by F. F. Finden, to whom the possession was then delivered. By indenture, dated the 24th of November, 1827, in consideration of 782*l.* 4*s.* 3*d.* paid by Finden, the first (1798) estate was assigned to him by John Baskett, "subject to such right of redemption as was or might be subsisting in the same premises by virtue of the mortgage of April, 1806, and of the same indenture of November, 1827. The possession of the estate was delivered to Finden, but the time when he entered into such possession did not appear; the bill alleged that it was contemporaneous with the execution of the conveyance.

Samuel Blencowe, the mortgagee entered into possession of the second (1799) estate, and died in 1814, and thereupon J. J. Blencowe, his executor, entered into possession. In consideration of 140*l.* paid to W. Warren, the executor of Daniel Warren, by Finden, W. Warren, by a deed of the 21st of October, 1825, assigned his interest in the second (1799) estate, and the principal sum of 300*l.*, and 165*l.* then stated to be due as interest thereon, to Finden, his executors, &c., for his and their own use and benefit. By an indenture dated the 27th of April, 1826, J. J. Blencowe and the plaintiff assigned the same (second, or 1799) estate to Finden, his executors, &c., in consideration of 700*l.* principal money, and 194*l.* interest due on the mortgage paid by Finden to J. J. Blencowe, at the request of the plaintiff, subject to the equity of redemption to which the premises were then liable. Possession of the second (1799) estate was thereupon given to Finden.

[*77] By an indenture dated the 11th of October, 1828, *made in pursuance of an agreement of the 29th of May preceding between Finden of the one part, and Thomas Middleton of the other part, reciting the charges on the two estates from

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1798 and 1799 downwards, that Finden had been for some time past in receipt of the rents and profits of the said several mortgaged premises, (comprising both estates,) and that, upon an account stated, there appeared to be due to him, upon or by virtue of the said recited mortgage securities, the principal sums of 782*l.* 4*s.* 3*d.*, 700*l.*, and 300*l.* making 1782*l.* 4*s.* 3*d.*, together with 240*l.* 10*s.* 7*d.* for interest, amounting to 2022*l.* 14*s.* 10*d.* in the whole, the said F. F. Finden, in consideration of 1850*l.* paid to him by Thomas Middleton, assigned to the said Thomas Middleton the said mortgage debts and the said several mortgaged premises, for the residue of the respective terms of years, but subject to such right or equity of redemption as was or might be subsisting in the same premises respectively. Thomas Middleton thereupon entered into possession of both estates, and continued in such possession until his death. Thomas Middleton died in February, 1829, having by his will devised and bequeathed his moneys and securities for money to the defendants, and appointed them his executors; and one of the defendants entered into possession of the mortgaged property under the will.

The bill was filed on the 15th of August, 1845, against the defendants, the representatives of Thomas Middleton, the purchaser, only, praying a declaration that the defendants were not entitled to stand as mortgagees, under the assignment by Finden to Middleton, for any larger amount of principal money than the 140*l.*, expressed in the indenture of the 21st of October, 1825, and that an account might be taken of the principal and interest due upon the several mortgage securities, *and [*78] of the rents and profits received by Finden and the Middletons, and an account of timber cut during their possession;—that, if necessary, an occupation rent might be set upon the premises—and rests made when the rents and profits and the produce of the timber exceeded the interest in arrear;—that the damage to the plaintiff from the want of repairs might be ascertained and deducted from what should be found due from the plaintiff;—and for redemption upon payment of the balance.

The defendants by their answer claimed the benefit of the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 28, which enacts,

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“that when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee or the person claiming through him; and in such case no suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given.”

At the hearing,—

Mr. *Romilly* and Mr. *Heathfield*, for the defendants, objected that the legatees of John Batchelor the elder* whose legacies were charged upon the estates in question, were necessary parties to the suit. If any right of redemption existed, the legatees were interested in the estates, and would be entitled to redeem; and the defendants, who denied the existence of the equity of redemption, were entitled to have that question determined in a suit, by which all parties entitled to raise the question would be bound.

Mr. *Rolt* and Mr. *Bird*, for the plaintiff, submitted, that the necessity of making the legatees parties was obviated by a statement respecting them introduced into the bill by amendment. It was alleged by the bill, and not denied by the answer, that all the legatees survived the testator, “and that a present right to receive the said legacies accrued to the legatees respectively, and they respectively were capable of giving discharges for or releases of the same more than twenty years before the filing of the bill in this cause; and that no part of the principal of the said legacies, or any of them, nor any interest thereon, has been paid,

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nor has any acknowledgment of the right thereto, or to any part thereof, been given in writing by the plaintiff or his agent, to the said legatees respectively, or any of them, or their or any of their agents or agent, within twenty years next before the filing of the bill; and that the said legacies are not, nor are or is any of them, or any interest in respect thereof, now chargeable upon or payable out of said mortgaged premises or any part thereof."

Mr. Romilly, in reply, said, that the allegation was insufficient without proof that all the legatees were bound by the lapse of time: they might have been infants, or beyond sea, or under some incapacity which would prevent the time from running.

* The cases of *Shiphard v. Lutwidge*, (a) *Hargreaves v. Mitchell*, (b) *Ward v. Arch*, (c) *Francis v. Grover*, (d) were mentioned, upon the effect of the charge of legacies upon the equity of redemption.

The VICE-CHANCELLOR held, that the legatees were necessary parties.

The argument of the case afterwards proceeded upon the undertaking of the plaintiff to remove the objection, by paying a sum of money into Court.

Mr. Rolt and Mr. Bird, for the plaintiff.

The deed of the 27th of April, 1826, to which the plaintiff was a party, constitutes an express acknowledgment of the mortgage by both Blencowe and Finden, the mortgagee and the transferee, within twenty years next before the bill was filed. There is no question, therefore, of the title of the plaintiff to redeem the premises [the second or 1799 estate] comprised in that assignment. The defence founded upon the statute, if it has any application,

(a) 8 Ves. 26.

(b) 6 Madd. 326.

(c) 12 Sim. 472.

(d) 5 Hare, 39.

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can only apply to the premises [the first or 1798 estate] comprised in Baskett's mortgage of 1806. But these premises were assigned by Baskett to Finden by the deed of the 24th of November, 1827, subject to the equity of redemption. The effect of that deed was to prevent the possession by the mortgagee from becoming adverse for twenty years,—that is, until November,

1847. The statute would not be construed to have a [*81] *retrospective operation. The law, before the statute,

gave the mortgagor the benefit of an acknowledgment of the existence of the mortgage, whether made to himself or to any other person—in other words, in trying a fact, mortgage or no mortgage—the Court received evidence of any clear admission by the mortgagee that he was not entitled to the absolute interest, although that admission might not be addressed to the mortgagor. The statute of 1838 enacts, that such admissions are no longer to be received, unless the acknowledgment be given to the mortgagor or his agent. But this will not be construed to exclude the legal effect of acknowledgments which had been made when the act was passed, and were then attended with a certain legal effect, and had conferred a certain legal right. In the year 1838, when the statute passed, the plaintiff had, by the then existing law, a right to redeem the estate which would continue until the year 1847. Can it be supposed that the Legislature intended to take away eleven years of this period, and conclude the plaintiff absolutely in the year 1836, when the twenty years, reckoning from the entry of Baskett, would expire? Or, which would be another mode of showing the injustice of such a construction, suppose the first mortgagee had entered in 1812, and several subsequent transfers of the mortgage had been made, always recognizing the existence of the equity of redemption, the mortgagor not being a party; suppose, also, that the last of such acknowledgments had been made in 1832; this would give the mortgagor until 1852 to redeem. In the year 1838 the act passed; would the Court so construe the act as to make it convert immediately the estate of the last transferee of the mortgage into an absolute interest?

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[The VICE-CHANCELLOR called the attention *of counsel to the case of *Towler v. Chatterton*,^(a) in which a party had, in February, 1828, received an oral promise by a debtor to pay a debt. Lord Tenterden's Act (9 Geo. 4, c. 14) passed on the 9th of May, 1828, and came into operation on the 1st of January, 1829. The action was brought in Hilary Term, 1829, when it was held, that, the promise not being in writing, the debt which had accrued more than six years before was barred by the statute.]

The Court would not, unless it was inevitable, come to a conclusion upon the effect of the statute which would lead to consequences so palpably unjust. It was not absolutely necessary to adopt that conclusion, for the word "mortgagee" did not of necessity include "transferree;" the statute might, therefore, well be held not to apply to a case in which the transferree of the mortgagee had obtained and held possession for twenty years; or, if the statute applied to that case, then the transferree might be regarded as a new mortgagee, and the time of his entry into possession might be considered as the time from which the statute was to run. Thus, the entry of Finden into possession in 1827 would give the plaintiff until the year 1847 to redeem. This construction would satisfy the words of the act. The year 1827 was, in fact, the time at which Finden, the mortgagee, obtained such possession.

Mr. Romilly and Mr. Heathfield, for the defendants.

The cases of *Lucas v. Dennison*,^(b) and *Trulock v. Robey*,^(c) were cited.

*The VICE-CHANCELLOR :—In this case the bill is filed [*88] by the mortgagor to redeem two different estates. In respect of that which I will call the first estate, it is objected by the defendants, that more than twenty years having elapsed since the mortgagee, or those under whom he claims, have been in

(a) 6 Bing. 258.

(b) 13 Sin. 584.

(c) 12 Sin. 402.

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possession without acknowledgment of the mortgagor's title, the property is not redeemable. With respect to the second, the right to redeem is admitted; but it is said, on the part of the plaintiff, that inasmuch as one mortgage on that property of 300*l.* was bought by a mortgagee, whom I will presently mention, for 140*l.*, the property is now redeemable on payment of that 140*l.* instead of the 300*l.* A further claim is made also in respect of dilapidations, which, it is admitted, must be matter for inquiry.

I will first state the conclusion to which I have come with regard to the operation of the Statute of Limitations on the first estate. Assuming that the statute does, in some cases, deprive the mortgagor of his right to redeem, where it does not appear that, in justice, there is any necessity for such a provision; it must be observed, that the statute did not, in this case, immediately, nor until after a considerable lapse of time, deprive the plaintiff of his equity of redemption. The mortgagor had nearly three years to insist upon his right to redeem, after the statute had passed. The statute passed in July, 1833, and it was not till 1836 that the twenty years expired; therefore, at all events, there were three years in which the mortgagor might have redeemed the estate after the passing of the act. Why, however, the mortgagee should not be allowed to make an admission (in writing signed by himself) of his mortgage-title to a third [*84] person, of which the mortgagor may have the *benefit, I do not know; but the statute requires that the admission should be made to the mortgagor himself, and by that I am bound.

Now, it appears to me, and the conclusion to which I have come in this case is, that the statute applies to and includes the case of a mortgagee in possession at the time when the act passed. I referred to some sections at the time of the argument which appeared to me to show that this must be the case. The 20th section appears to put this beyond dispute, for that section contemplates, among other cases, a case where the twenty years had actually run when the statute passed, and in some of those cases the right to redeem is saved. In this case, it appears that

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Baskett took possession of the first estate in 1816. He was a mortgagee within the act, and the defendant, who is in the situation of a purchaser of that mortgagee, is entitled to the same benefit. I think the right to redeem was barred when the bill was filed, unless there had been an acknowledgment such as the act requires. It appears to me, that there had been no such acknowledgment; and, therefore, as regards the first estate, that it is not now redeemable. It is impossible to hold, that this case is not within the statute, for the plaintiff's interest is an equity of redemption, which is the very interest the statute bars.

The second property is admitted to be redeemable. The question is as to the 140*l*. On the 21st of October, 1825, a mortgage for 300*l*. was assigned by Warren to Finden, who gave only 140*l*. for it. The allegation in the bill is, that Finden at that time was acting as solicitor as well for the plaintiff as for Warren, and Warren having agreed with the plaintiff to accept payment of the 140*l*. in full discharge of all principal *and interest moneys, owing upon the security, and the [*85] plaintiff being in want of money for that purpose, Finden advanced to the plaintiff 140*l*., by paying the same to Warren on the plaintiff's account, and thereupon the assignment of the 21st of October, 1825, was made to Finden, as trustee for the plaintiff. The bill alleges that an actual agreement was come to between the plaintiff and Warren,—Finden having acted as his friend and solicitor, in lending the money, and having become his trustee in carrying out the transaction. This is the case on the pleadings, but the case relied on at the bar was not founded upon any proof of Finden being a trustee. It was argued, that Finden being at that time the solicitor of the mortgagor, was not in a condition to buy up the mortgage at a reduced price for his own profit. The two cases might possibly lead to the same result, but different defences might be made to them; and the cases are obviously different. [His Honor then stated the evidence as to the alleged contract, remarking that Finden had not been examined to prove the transaction, and concluded by giving the plaintiff the option of taking an inquiry before the Master, whether it was agreed between the plaintiff and Warren

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that the plaintiff should pay 140*l.* in full, for principal, interest, and costs, on the security of the two indentures of May, 1809, and October, 1810; and whether it was agreed between the plaintiff and Finden that Finden should be a trustee of the indenture of October, 1825, for the plaintiff.]

As to the dilapidations, I have looked into the forms of the decrees, and I cannot find any distinct form on that subject. It appears to me, that the only inquiry can be, whether the mortgagee, to the damage and injury of the plaintiff, allowed [*86] the buildings to fall down. *There must be liberty to state special circumstances as to both inquiries.

The undertaking with regard to the payment into Court was not fulfilled, and the cause was ordered to stand over, with liberty to amend by adding parties. The legatees were made parties by amendment, and disclaimed. The cause was again set down for hearing, and the decree pronounced on the former hearing was taken without re-arguing the case.

Mr. *Torriano* appeared for the legatees.

The plaintiff sued in forma pauperis; and the decree gave him leave to redeem the second estate, on payment of the principal, interest, and costs.

Mr. *Rolt* submitted, that the costs of so much of the bill as related to the first estate, with respect to which relief was refused, ought not to be added to the costs of the redemption of the second estate. The second estate should not be charged with more than its own burden.

The VICE-CHANCELLOR said, that the costs of the suit, as to both properties, must be added to the principal and interest due upon the redeemable estate, to be paid by the plaintiff in case of redemption.

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[*87]

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The plaintiff became a member of, and purchased twelve and a half shares in a building society, constituted under the statute 6 & 7 Wil. 4 c. 32, and the society advanced a sum of 750*l.* in respect of such shares, upon a conveyance of certain property to the trustees of the society by way of mortgage. According to the rules of the society, 10*s.* per month subscription, and 4*s.* per month redemption moneys, were payable on each share, until a sum of 120*l.* per share should be realized for the non-purchasing members. On a bill against the trustees for redemption:—*Held*, that, upon the terms of the mortgage-deed and the rules of the society, the plaintiff was entitled to redeem only upon payment of all the future subscriptions on his shares until the dissolution of the society, the probable duration of the society to be ascertained by calculation, and the future payments to be treated as if immediately due.

THE suit was brought to redeem certain premises situated at Hoxton, which under a deed of the 11th of April, 1845, had been conveyed to the defendants, the trustees of the Equitable Provident Association and Savings Fund.

The Equitable Provident Association was established in September, 1844, under the act for the regulation of benefit building societies.^(a) The objects of the association were by the prospectus thus described: first, to raise a fund to lend to the members such sums as they may from time to time require, to enable them to purchase freehold or leasehold property; to buy land for building purposes; and to assist them to complete unfinished houses, or to erect others. Secondly, to afford persons who do not desire to purchase property a secure and profitable investment for such sums as they may think proper to deposit, by monthly payments of 10*s.*; all moneys thus received being lent out to other members, on the security of the property purchased by them. Thirdly, to enable persons who have obtained advances by way of mortgage upon their property, to pay off such incumbrances, and to liquidate the debt to the association by easy monthly payments, so that at the termination of the association

(a) Stat. 6 & 7 Will. 4, c. 32.

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such members will find themselves relieved from a heavy debt, during the existence of which, while owing to a private individual, they were in constant dread of a foreclosure of the [*88] *mortgage, and a forced sale of their property,—a proceeding which cannot take place while the money is owing to this association, so long as the members are not in arrear with their payments six consecutive months.

The first thirty-five articles of the society regulated the appointment and duties of the officers. 37. Every member to pay his or her subscription of 10s. per share per month, commencing at the first monthly meeting in October, 1844, and all fines which may become due from him, until the objects of the association shall be fully accomplished. Any member (not having executed a mortgage to the association as after mentioned) neglecting the payment of his subscriptions until the fines thereby incurred shall equal the moneys advanced by him or her, exclusive of the entrance fees, to cease to be a member of the association, and forfeit all his interest therein. 40. Persons admitted after the third monthly meeting to pay the monthly subscriptions from the commencement of the association together with such further sum as the directors, from a calculation of profits shall deem reasonable.

"42. That at every general meeting for advancing to shareholders the amount of their shares, the directors shall offer for general competition one share or sum of 120*l.*, at such premium as they may determine, and the member who offers the greatest premium beyond the sum so fixed, shall be declared entitled to the advance, and shall be at liberty to take such number of additional shares as the chairman of the directors may determine, at the same rate, provided he immediately declares his intention so to do, and provided the sum to be advanced upon such shares shall be within the amount which the directors shall declare they have to dispose of at such meeting. The directors [*89] shall *have power to sell an additional quarter, half, or three-quarter share at the same premium as the last pur-

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chase, if required, and such sale shall take place about half-past eight o'clock in the evening."

"44. That every member who purchases a share shall be bound to provide a good and sufficient mortgage of real property within three months from the date of the meeting at which such shares shall have been so purchased; and in default of his doing so, the shares so purchased by him shall be again put up to sale at the first monthly meeting next after the expiration of the said three months, and he shall be liable to any loss consequent upon such re-sale, and in addition thereto he shall pay to the association a fine of one guinea for every share so purchased by him, and again put up for sale. Provided, nevertheless, that the directors may extend such period for an additional term of three months, upon the member paying interest at 5*l.* per cent, for the accommodation, on the net sum he is actually to receive after deducting premiums only."

"48. That when any member shall be entitled to receive the amount of the value of his or her share or shares, pursuant to Rule 42, he or she shall give notice to the manager of the nature and situation of the property intended to be offered as security for the future payments in respect of such share or shares, and deposit with him, for the surveyor, the fee specified in these rules for making such survey; and the manager shall forthwith transmit such notice to the surveyor, and each of the directors respectively, and the surveyor shall, within seven days after the receipt thereof, examine the premises mentioned in such notice, and make his report in writing to the directors."

*"50. That when the directors are satisfied that the [*90] property so offered is a sufficient security to the association, they shall pay, or order to be paid to such member, the sum or sums of money which he or she shall be entitled to receive, on such member executing a mortgage of such property, as the solicitor to the association shall require, and depositing the same, and all other necessary title-deeds relating thereto, with

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the trustees as a security to the association for so much money as shall be therein expressed to be secured."

"58. That in the mortgage, the usual covenants for insurance shall be inserted, it shall be specified that in case the said member shall at any time thereafter fail, neglect, or refuse, for six monthly nights, to pay all or any of his or her subscriptions, payments, and redemption-money, or to observe and perform all or any of the regulations on his or her part respectively to be paid, observed and performed, then the trustees for the time being shall appoint a person or persons to collect the rents and profits of the premises therein mentioned; but should the same be insufficient to satisfy the purpose aforesaid, then the said trustees shall, without the concurrence or consent of such member, absolutely sell and dispose of all or any part of the said premises, either by public auction or private contract, for the most money that can be had or gotten for the same, and shall receive the purchase-money arising therefrom; and at such public sale the trustees, or one of them, or some other person to be appointed by them, or him, in writing, shall be allowed to buy in the premises on behalf of the association, and to re-sell the same without being answerable for any loss to be occasioned by such re-sale, but that

if any loss should be occasioned by such re-sale, it shall [*91] be borne by the mortgagor; and *out of the money to arise

from such collection of rents and profits, or such sale as aforesaid, the trustees for the time being shall, in the first place, discharge all costs, charges, and expenses which may be incurred on account of such collection of rents, or sale or sales, or in any-wise relating to the trusts therein contained; and, in the next place, shall retain and reimburse themselves and the said association, all such principal subscriptions, and other payments as shall be then due, owing, and payable by such member, under and by virtue of these rules and the mortgage; and the moneys so retained for the said association shall be immediately placed at the bankers, to the account and for the use and benefit of this association; and they shall pay the surplus (if any) arising from such sale or collection of rents, to the said mem

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ber, or to such other person or persons as he or she shall, by writing under his or her hand, direct or appoint to receive the same. That in case any mortgagor shall be himself the actual occupier of any premises mortgaged to this association, then and in such case the mortgage deed shall contain a stipulation that he shall become tenant to the trustees, at a rent which shall be sufficient to cover the amount of his yearly payment; and the trustees shall have power of distress, as in cases of landlord and tenant; and with the money to be produced by such collection of rent, issues, and profits on such sale, the trustees for the time being shall, in the first place, discharge all costs and expenses which may be incurred on account of such collection of rents, or sale or sales, or in anywise relating to the same. And in the said mortgage it shall be declared, that the receipt or receipts of the trustees for the time being, acting under that deed, shall be a sufficient discharge and discharges to all tenants and purchasers paying any money to such trustees, without being accountable for the misapplication or non-application thereof; and *that [*92] the purchaser or purchasers shall not be required, or under the necessity of inquiring into the propriety of such sale or sales, or whether any such default or deficiency shall have taken place." ●

" 59. That any member having purchased a share or shares shall pay the sum of 4s. as and towards the redemption thereof for each and every share, and in proportion for every fractional part of a share, he or she may hold at the then next general meeting of the association after receipt thereof, and shall continue paying the same during the continuance of the association, at every succeeding meeting, with and in addition to the monthly subscriptions; and such member shall be liable to the payment of one half of the fines for the non-payment of his or her redemption money, per share, at the periods above specified, as he or she would be liable to according to Rule 37, for non-payment of his or her regular subscriptions."

" 62. That if any member of this association shall be desirous

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of paying off and redeeming any security or securities which he or she shall have given to this association, and shall give notice of such his or her desire to the manager, the directors shall allow such member the profits of his share or shares, made up to such time, and shall make a deduction of such profits, and of the amount of subscriptions paid in by such member, from the full amount expressed to be secured in and by the mortgage; and the directors are hereby authorized and empowered to receive the balance, either in one payment, or by such instalments as the directors and the member shall agree upon; and on payment of the balance, together with all fines due in respect of such share or shares, the directors shall authorize the trustees to deliver all deeds and other documents in their custody, relating to [*98] the mortgage so *redeemed, to the member; and at his or her cost indorse a receipt or acknowledgment of payment on such mortgage, according to 6 & 7 Will. 4, c. 32."

"65. That any person who shall be desirous of withdrawing from this association any share or shares which shall not have been purchased according to Rule 42, shall be allowed to do so on giving one month's previous notice in writing of such his or her intention to the manager at any general meeting of the association, and the money subscribed in respect of such share or shares shall be repaid to such member, subject only to the forfeitures next hereafter mentioned; that is to say, if application to withdraw shall be made within the first year from the first meeting thereof, a forfeiture of one guinea per share, in addition to the entrance fee; if within the second year from the said first meeting, a forfeiture of 10s. 6d. per share, in addition to the entrance fee; that if the application to withdraw be made within the third or fourth year from the holding of the said first meeting, he shall take out the net amount of subscriptions paid, exclusive of entrance fee only; that if the application to withdraw any such share or shares shall be made within the fifth, or any subsequent year from the holding of such first meeting, the directors are hereby empowered to allow the members so desirous of withdrawing, out of the profits which the association shall

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have realized, such bonus for the withdrawal of each share as they shall from time to time determine."

"103. That when the amount or value of 120*l*. shall have been realized for each share, after all expenses and liabilities of this association have been fully paid and satisfied, the accounts shall be finally audited, printed, and sent to each member, in manner hereinbefore mentioned, and this association shall terminate, and the trustees *shall, upon the authority in writ- [*94] ing of the directors, signed by the chairman and attested by the manager, deliver up to each member, or his or her legal representatives, the title deeds and other documents which shall have been deposited with them by such member, as a security to this association, and shall and will, at his, her, or their request and expense, indorse on his or her mortgage and security a receipt for all the moneys intended to be secured thereby, pursuant to the 6 & 7 Will. 4, c. 82, s. 5."

The plaintiff, in 1845, with the view of obtaining an advance of money to erect some houses on the land at Hoxton, became a member of, and subscribed for twelve and a half shares in the association, by becoming a purchaser of that number of shares in the manner prescribed by the 42nd article, and the premises at Hoxton and in the Edgeware Road were accepted by the association as a mortgage, in conformity with the 44th article.

The mortgage deed, dated the 11th of April, 1845, recited the title of the plaintiff to the premises, the institution of the association, and that the shares, on being realized, would amount to 120*l*. each.; that the plaintiff had become entitled to twelve and a half shares, and was, according to the rules of the association, entitled to receive out of the funds thereof 750*l*., in respect of the said shares; and that, for securing the due and regular payments of the subscriptions, redemption fee, and other moneys which should become payable by the plaintiff, in respect of his shares, it had been agreed that the said premises should be assigned and demised to the defendants, the trustees of the association, upon the trusts thereafter declared; and in consideration

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of the sum of 750*l.*, the parties thereto of the first and second part assigned and transferred the messuages and premises [*95] to *the trustees of the association for the residue of the terms therein mentioned, upon trust, if the plaintiff, his heirs, executors, &c., should from time to time duly pay, observe, and perform all the subscriptions, payments, redemption money, and regulations, on his and their part to be paid, observed, and performed, according to the articles of the association, in respect of the said twelve and a half shares, to permit the plaintiff, his heirs, executors, &c., to hold and enjoy the said premises, and receive the rents and profits thereof, for his and their own benefit. But if the plaintiff should fail, neglect, or refuse, for six monthly meetings, to make and pay all or any of the subscriptions, payments, and redemption moneys, to observe and perform all or any other regulations on his or their parts to be paid, observed, and performed, or should not keep the premises in good repair, pay the rent, and perform the covenants in the lease on which they were held, and insure the premises from fire, or if he should become bankrupt or insolvent, then in any or either of such cases the trustees of the association should appoint a collector of the rents, and thereout pay, satisfy, and effect all the said purposes; and, if the rents should be insufficient for such purposes, upon trust to sell the said premises, and out of the moneys to arise from such rents and profits or sale, in the first place to retain and pay the expenses incurred in the execution of the trust, and then to retain for the association all such subscriptions and other payments as should be then, and should thereafter become, due, and owing, and payable, in respect of the said shares, by the plaintiff, his executors, administrators, and assigns, calculating the probable duration of the said association, it being thereby declared and agreed that, in case such sale as aforesaid should take place, all moneys which should at any time afterwards become due in respect of the said shares should be considered as due at the time of such sale, and that the same should [*96] be *fully deducted and paid out of the moneys raised by virtue of the said powers or trusts, and that the trustees or directors of the association should calculate the amount

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accordingly ; and upon trust to pay the surplus money, if any, to arise from such sale and rents as aforesaid, to the plaintiff, his heirs, executors, administrators, and assigns.

The plaintiff fell into arrear in respect of his monthly subscriptions, and the trustees exercised their power of sale as to part of the property comprised in the security. The plaintiff, on the 30th of April, 1847, tendered to the trustees 690*l.*, the sum which he calculated to remain due in respect of the mortgage, but this sum the trustees refused to receive, except as a payment upon account. The plaintiff also offered to pay, in addition, the costs of the solicitor of the association. The bill, which was filed in May, 1847, prayed that an account might be taken of what was due to the defendants, as such trustees, on the mortgage security, and that it might be declared that, in taking such account, the plaintiff should not be charged with any sums for redemption-moneys, subscriptions, fines, or other payments on the said shares, accruing after the tender,—the plaintiff confirming the sale which had been made, and paying what should be found due from him. And that, upon such payment, the defendants might deliver up to the plaintiff the deeds, and indorse an acknowledgment or receipt on the mortgage security, according to the 62nd rule, or execute such deeds as might be necessary to re-invest the premises in the plaintiff.

The answer of the trustees denied the title of the plaintiff to redeem the mortgaged property, except upon payment of all the future subscriptions ; and said that the amount of such subscriptions must be ascertained on the *same principle [*97] as the mortgage-deed directed in cases where the mortgaged premises were sold by the association owing to the default of the mortgagor.

Mr. *Rolt* and Mr. *Prior*, for the plaintiff, principally relied on the 62nd section of the articles, in which the terms of redemption are expressed to be, that the profits of the share up to the time of redemption, and the amount of subscriptions paid in by the member, are to be deducted from the full amount expressed to be secured by the mortgage, and, upon payment of the

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balance, the deeds are to be delivered up. They contended that this clause of the articles was not reconcilable with the claim of the society, that the payment of the subscriptions must be continued until the dissolution of the society. As an association formed under the statute, they must adhere to the regulations which gave them the benefit of the statute. Departing from the provisions of its constitution, the contract of a building society might become usurious, and illegal. The mortgage-deed in this case would be clearly tainted with usury, unless it were protected by the statute.

They asked for such a declaration or direction to the Master, as to the principle upon which the account was to be taken, as would obviate the expense of determining that question upon exceptions, and of then going a second time before the Master.

Mr. Romilly and Mr. Beavan, for the trustees of the association, insisted, that the plain meaning of the rules of the association was, that a party who became a purchasing member, by that means received the amount of his share immediately, without waiting for the termination of the society; he, in [*98] fact, discounted his share, *and thereby incurred the obligation of continuing a member, or, at least, of continuing to pay his subscriptions so long as the society should endure, or so long as, according to the then state of its funds, its probable duration might by calculation be ascertained. This contract was distinctly shown by the terms of the mortgage deed.

On the suggestion that the contract was usurious, they cited *Beete v. Bidgood*, (a) *Floyer v. Edwards*, (b) and *Spurrier v. Mayoss*, (c) as showing that usury arose only in cases of loan, and not of purchase. This was, in fact, the purchase of an annuity by the association, such annuity being paid in the shape of monthly subscriptions.

The VICE-CHANCELLOR :—The plaintiff is the owner of twelve

(a) 7 B. & C. 453.

(b) 1 Cowp. 112.

(c) 1 Ves. jun. 527; S. C., 4 Bro. C. C. 28.

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and a half shares in "The Equitable Provident Association and Savings Fund," established on the 6th September, 1844, under the statute 6 & 7 Will. 4, c. 32, intituled "An Act for the Regulation of Benefit Building Societies." The first three defendants are the trustees of the society, and represent the society upon the record. Ann Mosley, the remaining defendant, is the plaintiff's wife, and is made a defendant in respect of an interest she has in the property comprised in the mortgage in question.

The bill is for the redemption of the mortgage executed by the plaintiff to the trustees, in April, 1845; and the only question is, as to the principle upon which the mortgage account is to be taken. This, it is conceded, *must [*99] depend upon the construction of the mortgage deed, affected or not (as the case may be) by the articles of the association to which, for some purposes, the deed refers.

The plaintiff has contended, that, in taking the account, he is to be charged with the capital moneys, 750*l.* advanced, and also with certain fines to which he has become liable to the society, and is to have credit for all the monthly subscriptions of 10*s.* and monthly sums of 4*s.*, which, under name of redemption-moneys, he has paid since the advance; and that upon payment by him to the association of the balance due upon the account so stated, he is entitled to redeem the mortgage. The trustees have contended, that the plaintiff is a shareholder who has received the value of his shares in advance, and is bound to continue his monthly payments so long as those who have yet to receive their shares shall be bound to pay them; and (applying this to the mortgage) that, by the terms of the mortgage-deed, the mortgage was to be paid by monthly payments of 10*s.* each, by way of subscription, on the plaintiff's twelve and a half shares, and further monthly payments of 4*s.* each, under the name of redemption-moneys; that such payments were to continue until the dissolution of the society, which was to take place as soon as, by its operations, the shares should be of the value of 120*l.* each; and that the plaintiff is entitled to redeem the mortgage only upon payment of the future monthly subscriptions and redemption-moneys. Some further claims are made

1848.—*Mosley v. Baker.*

on behalf of the association ; but these do not affect the question in dispute between the parties, and may, therefore be excluded from consideration. I shall, for the same reason, exclude from consideration any question with respect to profits, for the disposal of which some provision is made in the articles.

[*100] *Now, if the matter in dispute is to be settled by what appears upon the mortgage-deed, that is, if there be nothing in the articles of the association which, by reference in the mortgage-deed, affects its construction, it is clear, in my apprehension, that the claim of the association is well founded. I have read the articles, and, although the language in which the clauses bearing upon the matters in question are expressed do not in all respects appear to contemplate a mortgage in the form of that which plaintiff seeks to redeem, there is nothing in the 62nd clause, or any other, which, as I understand them, is inconsistent with such a contract as I suppose the plaintiff to have made by the mortgage-deed. And if (as I think is the case) the construction of the mortgage-deed is free from ambiguity, it cannot be invalidated, nor can its effect be controlled, by any ambiguous expressions in the articles of the association.

The facts necessary to explain the transaction are these:—The object of the association was to raise a fund by monthly subscriptions for the purpose of being lent upon security to such of the members of the association (not to strangers) as should be desirous of borrowing money ; and these operations were to be continued until, by the monthly payments of the members, and the profits of the association, the value of each share should amount to 120*l*. The monthly subscription of the non-borrowing members was to be 10*s*. per share, and with this and the subscriptions and payments of the borrowing members, and certain fines, it was calculated or expected that the value of the shares would amount to 120*l*. in something less than ten years. When this was accomplished, the funds were to be divided amongst the shareholders, and the association was to be dissolved. Whether the calculations of the association were accurate, or their expectations justified by them, or whether the bargain was

[*101] *provident, is not now the question. The bill asks

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for the execution of the mortgage contract, and does not impeach it on any ground, whether of illegality or impracticability; and the only question before me, upon these pleadings, is, what was the contract between the association and the plaintiff as a borrowing-member?

Now, the principle upon which the association appears to have proceeded in making advances to its members, as shown by the 42nd and subsequent articles, was not that of a simple loan to a stranger upon a security. No one could be a borrower except a shareholder, and the loan to him was to be effected by paying him the present value of his share in advance,—that is, the present value of a share which was treated as worth 120*l.* at a future time. In applying this principle the following course was pursued:—It was taken for granted that 120*l.* would be the value of each share at the time appointed; the monthly subscription of 10*s.* on each share, payable by non-borrowing members, was fixed; the same monthly subscription, and, by sect. 59, a further monthly payment of 4*s.* per share, (under the name of redemption-moneys,) by borrowing members, were also fixed; as were the fines payable by each class of members in case of default in paying the sums to which they were liable. In this state of things, the transaction being between the members of the association inter se, everything material being fixed or agreed upon, and the association having, by its directors, ascertained they had a fund to dispose of, the directors offered one share, or sum of 120*l.*, for competition amongst all members desirous of borrowing, at such premium as the directors thought fit; and the member who offered the greatest price above the sum so fixed was to have the advance, and also such additional shares as the chairman of the directors should determine, within the amount *which the directors should declare they had to dispose [*102] of at such meeting.

[His Honor read the clauses 42 and 48.]

Bearing these things in mind, and that the question is, whether the plaintiff, having at the time and in consideration of the ad-

1848.—*Mooley v. Baker.*

vance become a shareholder in the association, and received the value of his share in advance, is not bound to continue his monthly payments until the other shareholders (continuing their subscriptions also) shall have received the value of their shares also,—that is, during the continuance of the association; or whether the plaintiff has a right to treat the advance to him as a mere loan to a stranger who has paid certain instalments towards satisfaction of his debt. Bearing (I say) these things in mind, the deed itself will be easily understood.

[His Honor stated the material parts of the mortgage deed.]

Is there, then, anything in the articles of the association to invalidate or alter the effect of the deed, as mere matter of construction? The circumstance that the association had an option, under clause 58, to sell the property in case of the plaintiff's default, will not alter this question. It was an option which they might exercise or decline. But the clause is manifestly so inaccurate, that it cannot furnish, by implication, an inference from which to conclude, that the deed that is free from ambiguity, and consistent with the articles, does not express what the parties intended. The clause strictly admits of interpretation in conformity with the deed. If there was any doubt upon this (which there is not,) the suit should have been to impeach or correct the deed, which the pleadings do not seek to do. Nor

[*108] *does the bill suggest any difficulty in ascertaining the future duration of the society, so that the amount of the payments may be settled. I cannot, in such a case, treat the deed as invalid for any purpose within the contract, or consider its construction as altered by the terms of the articles. It is not necessary to remark upon all the articles which may be the subject of comment; but I may observe that the 59th and the 65th clauses tend to support the claim upon which the defendants insist. The non-purchasing members have power to retire from the association, but there is no corresponding right reserved to the purchasing members.

It was said, however, that the case made by the association

1848.—*Mosley v. Baker.*

was objectionable in itself. It was admitted that the right of the plaintiff to make for himself such a contract as he pleased could not be disputed; but it was said that the contract, as insisted upon by the association, was of such a character that the court would not give effect to it. I cannot take that view of the case. To me it appears that every shareholder, whether purchasing or non-purchasing must *prima facie* stand in the same position,—must be liable to pay all the future contributions until the association terminated; and that the position of the two classes of members must be and continue in this respect the same whether he receives the value of his share before, or awaits the receipt of it at the termination of the association.

The advance, as I have said, was not a mere loan to a stranger out of the funds of the society,—it was an advance, at its then present or conventional value, of the value of the plaintiff's interest in the shares he held, at the termination of the association. He was therefore in the position of a member who had received by anticipation the 120*l.* which the non-purchasing members were not to receive until the termination of the association. *In other respects,—or at least in one important [*104] respect,—the position of the two classes of members was the same. Each had to pay (according to the rules of the association) the price of his shares, so far as the future monthly payments were concerned. And if the transaction were left to work itself out in a regular course, there can be no doubt that the plaintiff was as much bound to pay his future monthly payments as any non-purchasing member. The circumstance that he had discounted his share and received its value in advance would not alter his liability in this respect. He is a purchaser of shares who has received the value of his shares, but whose purchase-money is unpaid. It is not in dispute that the plaintiff might claim the privilege of settling his account with the association in that way, and that the association could not (unless the plaintiff were in default) make any demand upon him, except in respect of his monthly contributions. The question is, whether the association had not a corresponding right to say that the transaction should be worked out in the same way.

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The plaintiff, in fact, by what he now asks, insists upon a right to rescind the transaction which made him a shareholder, and to be as it were a stranger to the association from the beginning. This it is not open to him to do. I desire it, however, to be understood, that I proceed upon the stringent words of the deed, and the insufficiency of anything in the articles to affect its construction.

On the minutes of the order a question arose, whether upon taking the account of the future subscriptions to be paid by the plaintiff, the amount was to be ascertained by mere addition of the sums, or by determining the present value of the future payments.

[*105] 13th Feb.—THE VICE-CHANCELLOR:—My decision upon the principle upon which the account in this case ought to be taken was in favor of the claim of the association. I so decided upon construction of the mortgage-deed. And in order that the plaintiff might have a ground of immediate appeal, I proposed to insert in the decree a direction to the master to ascertain the amount of the plaintiff's present liability in respect of future payments under the mortgage-deed. This has given rise to a new question which had not before been adverted to. Is the Master, in ascertaining such present liability, to charge the plaintiff with the present value of his future monthly contributions, or with their actual amounts as if the same were now due?

At the time of expressing my opinion upon the principal case, I suggested (what appeared to me) objections to the contract contained in the mortgage-deed, and others have since occurred to me. My observations upon that subject, however, must not be pressed too far. To some extent all other shareholders will suffer from miscalculations and losses as well as the purchasing shareholder. To some extent he is only in the position of a partner who participates in the losses which happen to the whole concern. But as I cannot but think that a contract like that contained in the mortgage-deed is not free from observation, I must repeat what I before stated, that in the decision I have already pronounced, I have proceeded exclusively upon the mortgage-deed.

1848.—*Mosley v. Baker.*

If the articles to which the deed refers had been inconsistent with the deed, I might have been bound to consider whether the deed was authorized by the articles, or to have modified the language of the deed in construction, with reference to the language of the articles to which the deed refers. But *being [*106] satisfied that there was no inconsistency, I held myself bound to look to the deed as evidence of the rights of the parties. I shall pursue the same course for the purpose now before me. What then is the principle upon which in the abstract a mortgagor is entitled to redeem his security? Is it not that of paying "the full amount of what is secured by the mortgage,"—the very words of the 62nd clause in the articles. What, then, is the full amount secured by the mortgage in the present case? The principle of my decision is, that the plaintiff is a shareholder who has received in advance the present value of his share, which (value of their shares) non-purchasing shareholders will not receive until 120% each has been realized. His future monthly payments constitute the purchase-money which he is to pay for what he has received; and those payments are therefore the amount which the mortgage was created for the purpose of securing. That alone, however would leave the present question open. But in the deed I find a clause which decides what in fact the rights of the parties are, in the case of realizing (not indeed by foreclosure, for that would decide the very point) by sale the amount secured. [His Honor read the clause in the mortgage-deed, providing that the moneys which should at any time afterwards become due should be considered as due at the time of such sale.(a)] I do not think that the right would be different in case of redemption, and I must therefore direct the account to be taken of what is due to the defendants, in respect of the future subscriptions and payments according to the terms of the mortgage-deed.

(a) *Supra*, p. 95.

 1847.—Wright v. Angle.

[*107]

WRIGHT v. ANGLE.

1847: 21st Nov. 4th and 8th December.

The omission by a party to serve notice, according to the 23rd General Order of October, 1842, of filing a replication, plea, demurrer, &c., and the opposite party on the same day that the replication, plea, demurrer, &c., is filed, will, in ordinary cases, be corrected, not by rendering the replication, plea, demurrer, &c., inoperative, or taking it off the file for irregularity, but by extending the time allowed to the opposite party for taking the next step in the cause, so as to give him the benefit of the time which he would otherwise lose by the delay in the service. A defendant whose motion to dismiss was answered by a replication, refusing to accept costs for preparing and serving the notice, and proceeding with his motion, —it was refused with costs, minus 20s.

On the 29th of October, the defendant served his notice of motion, for the first day of Michaelmas Term, to dismiss for want of prosecution. The plaintiff on the same day filed his replication, and on the 30th of October he served the defendant with notice thereof. The 31st of October was Sunday. On the 1st of November, the plaintiff's clerk went to the office of the defendant's solicitor, for the purpose of tendering the costs of preparing and serving the notice to dismiss. The defendant's solicitor said he should not accept the costs if tendered, inasmuch as the replication was irregular and ineffectual, from notice of it not having been given on the same day that it was filed, as directed by Order XXIII. of the 26th of October, 1842.

Mr. *Bovill*, for the defendant, moved that the service of notice of the replication might be set aside for irregularity, and the replication might be taken off the file, on the ground of the omission to give the notice until the day after the replication was filed, in breach of the General Order. He cited *Johnson v. Tucker*,^(a) *Matthews v. Chichester*.^(b)

Mr. *Swift*, contra.

*See note, p. 12.

(a) V. C. of England, June 12th, 1847; 11 Jurist, 466.

(b) 5 Hare, 207.

1847.—Wright v. Angle.

The VICE-CHANCELLOR:—The object of the 23rd General Order of October, 1842, obviously is, that the party against whom a step is taken may have the benefit of the full time allowed by *the practice of the Court for proceeding to [*108] the next step in the cause. Where, therefore, as in this case, notice is not given until the following day, the party entitled to the immediate notice loses some part of the time which the practice and the general rules of the Court allow him. Whenever this happens, the Court may adopt one of two courses for correcting the effect of the irregularity, the Court may either give the Order a retrospective effect, and render the step which has been taken inoperative, or obviate the consequences of the irregularity by adding to the time allowed to the other party for taking the next step in the cause, the time which has been lost to him by the delay in the service of the notice. In either case the costs of the application must be borne by the party whose irregularity has occasioned it. The rule of the Court, which requires the notice to be immediately given, is not confined to replications, but applies equally to demurrers, pleas, and other proceedings; and I have often had occasion to consider in what way an omission to give the notice should be dealt with. The conclusion I have come to is, that generally speaking the proper course is to extend the time for the next step, and not treat the step already taken as irregular from the beginning. I did not so decide without conferring with other judges upon the point; and I was not aware until the argument upon the present motion, that the *Vice-Chancellor of England* had taken a different view of the case. It is not without the greatest hesitation that I venture to differ from the opinion of a Judge of so much experience, but the point is one on which I feel bound to do so. The conclusion I have come to appears to me to answer every purpose of justice; it terminates litigation on the subject, and simply puts the cause in a regular course of proceeding, in a more convenient manner, in my opinion, than is done by holding that a replication regularly filed has *become irregular by the subsequent [*109] delay in giving notice. A party may always avoid delay by ascertaining whether his adversary has taken any given

 1847.—Wright v. Angle.

step at the expiration of the time allowed by the practice. In fact, I treat the order requiring notice to be given on the same day as directory. I do not, of course, say that special circumstances may not exist to make the other course the most proper for correcting the error which I suppose to have been made, but in the present case I do not see any such special circumstances. The application should have been to extend the time; the defendant required further time, owing to the plaintiff's omission. There being a contrary decision, upon which the defendant has relied, I refuse the motion, without costs.

As it is desirable the practice should be settled, the case is a very fit one to be submitted to the highest authority in the Court.

4th Dec.—Mr. Bovil appeared on the motion to dismiss, of which notice had been given on the 29th of October.—He submitted that, although the substance of the motion had been met by the replication, yet, as the notice was regular, the Court would order the plaintiff to pay the costs: *Attorney-General v. Cooper*, (a) *Corporation of Dartmouth v. Holdsworth*. (b) In this case there had been no actual tender of any sum whatever in respect of costs.

Mr. Swift, for the plaintiff, cited *Piper v. Gittens*. (c)

The VICE-CHANCELLOR refused the motion to dismiss the bill; and, on the authority of *Piper v. Gittens*, refused
 [110] *it with costs, to be paid by the defendant to the plaintiff, minus 20s. payable by the plaintiff to the defendant for his costs of the preparation and service of the notice to dismiss.

(a) 9 Sim. 379.

(b) *Id.* 828.

(c) 11 Sim. 282.

1847.—Matthew v. Bowler.

*MATTHEW v. BOWLER.

[*110]

1847: 27th Feb.

Sale and assignment of a life interest in leaseholds in consideration of a weekly sum, to be paid to the vendor, during her life, with a covenant by the purchaser, for himself, his heirs, executors, and administrators, to make the weekly payment to the vendor, and to repair and insure the premises, and otherwise perform the covenants in the lease:—*Held*, that the vendor was entitled to a lien on the life interest in the leaseholds, which was the subject of the assignment, for the weekly payment.

THE plaintiff, who was entitled for her life to certain improved rents, arising out of leasehold tenements, assigned her life interest, by an indenture dated in January, 1832, to the defendant his executors, administrators, and assigns, absolutely, in consideration of 15s. per week during her life, secured to be paid to the plaintiff; and the defendant, for himself, his heirs, executors, and administrators, thereby covenanted with the plaintiff, that he, the defendant, his heirs, executors, &c., would duly pay to the plaintiff the said 15s. weekly during her life, and would also pay the ground rent, insure the premises from fire, keep them in repair, and otherwise perform the covenants contained in the original lease, and indemnify the plaintiff (and the executors of the will of the testator under which her title was derived) in respect thereof. The defendant entered into possession of the property, and paid the 15s. a week for some years, but afterwards ceased to make the payment. The bill was thereupon filed to establish a lien on the leasehold estate which had been assigned to the defendant, for the arrears, and the future weekly payments, and to recover the amount out of the rents.

Mr. *Whitbread*, for the plaintiff, cited *Tardiffe v. Scrugham*,^(a) and also 8 Sugd. V. & P. pp. 197, 203, *ed. 10, [111] as authorities that a lien was raised in favor of a vendor where the estate was sold for an annuity. Two circumstances in

(a) 1 Bro. C. C. 423.

1847.—Matthew v. Bowler.

this case, moreover, favored the claim of the plaintiff,—the assignment was expressed to be “in consideration” of the annuity, and the covenant by the defendant to insure, repair, &c., would be of no value to the plaintiff but upon the supposition that the estate was to be her security.

Mr. *J. H. Palmer*, for the defendant, relied on *Mackreth v. Symmons*,^(a) *Clarke v. Royle*,^(b) *Parrott v. Sweetland*,^(c) and *Buckland v. Pocknell*,^(d) as showing that the plaintiff had not reserved any lien on the property. The covenant by the defendant did not carry the case further than to give the plaintiff her personal security, for it did not bind “assigns.”

Mr. *Whitbread*, in reply, said, that the cases referred to proceeded upon the fact that the vendor had taken another security for his annuity. Here no other security was taken.

The VICE-CHANCELLOR said, that if the case of *Tardiffe v. Scrugham* was not approved, it certainly was not overruled by Lord Eldon. The case had been much considered by Sir. Edward Sugden; and it was clear that his opinion was, that the lien in such a case ought to be sustained. He should be most reluctant to come to a different conclusion. He was of opinion, in this case, that the plaintiff was entitled to the lien claimed by her bill. The purpose of the covenants in the deed to uphold the property could scarcely be understood, unless the property was intended to constitute a security.

(a) 15 Ves. 352. Per Lord Eldon.

(b) 3 Sim. 499.

(c) 3 Myl. & K. 655.

(d) 13 Sim. 406.

1847.—Gibson v. Ingo.

*GIBSON v. INGO.

[*112]

1847: 27th, 28th, 29th and 30th January; 14th April.

There is nothing in the character or nature of the certificate of registry of a ship which excludes it from the jurisdiction of the Court to decree its delivery as against a party unlawfully detaining it.

The master of a ship has no lien on the certificate of registry, either for his wages or for moneys disbursed by him for the use of the ship; nor have the ship-brokers any lien on the certificate of registry for advances made by them to the owner for the use of the ship.

The master of the ship has no claim on the accruing freight, either for his wages or for moneys disbursed by him for the use of the ship.

Shipbrokers advancing moneys to the owner of a ship for the ship's use, having at the same time notice (by an indorsement on the certificate of registry) of a prior mortgage on the ship, are not entitled to be repaid their advances out of the freight in priority to the mortgagee, although the mortgagee does not take possession of the ship until after she has entered the docks from her homeward voyage.

The vendor of a ship, with a covenant for title, retains, after the sale, (in order that he may fulfil his contract, and defend himself against an action brought upon his covenant,) such an interest in the certificate of registry as enables him to sustain a suit for its delivery against a party unlawfully detaining it.

Notice of a charge to an indefinite amount although the notice be inaccurate as to the particulars or extent of the charge, is sufficient to put upon inquiry a party dealing for the property subject to the charge; and if the actual charge afterwards appears to be incorrectly described in the notice, it is nevertheless sufficient, as a ground for giving priority for the true amount of the charge, as against the party who received the incorrect notice, but made no inquiry.

THE defendant, Ingo, the owner of the ship *Ann M'Kenzie*, of Newcastle, in October, 1839, mortgaged the ship, together with all her freight then due or to become due, to the plaintiff, Gibson, for securing to the latter the payment of four bills of exchange of 600*l.* each. The mortgage-deed was executed, and the mortgage indorsed on the certificate of registry in July 1840. The indorsement stated the mortgage to be for securing payment of 600*l.*, and all sums of money which might thereafter become due to Gibson. By a charter-party, dated the 5th of August, 1840, made between Ingo and Messrs. Gould and Dowie, the ship was chartered for a voyage to America and back, to be re-

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ported, on her return, at the Custom House, in London, by the defendants, Carter and Bonus, shipbrokers, and the freight to be paid on "unloading and right delivery of the cargo." The stipulation in favor of the shipbrokers, Carter and Bonus, was introduced by agreement between them and Ingo, in consideration of their having, at the time of making the charter party, advanced Ingo 50*l.* in cash and paid some other sums, part of which it appeared had been for the purposes of the ship, and for enabling her to proceed on the outward voyage. The defendant, Simpson, was the master of the ship, and he also made some advances for the like purposes.

[*118] *The Ann M'Kenzie performed her voyage, in pursuance of the charter party, and arrived at the port of London on the 9th of January, 1841, and entered the Commercial Docks on the following day. On the 11th of January, an agent of the plaintiff, on his behalf, went on board, and demanded from Simpson possession of the ship, and also of the certificate of registry and ship's papers. The demand was not acceded to, but the plaintiff's agent was allowed to put on board a ship-keeper, to hold possession on his behalf; and the plaintiff's solicitor gave notice to Gould & Dowie, the charterers, to whom the cargo was consigned, and also to the Dock Company, of the plaintiff's claim to the freight under his mortgage.

Various proceedings afterwards took place before the magistrates, at the police office, and otherwise, to compel Simpson to deliver the certificate of registry to the plaintiff, and to determine the questions between the parties. Simpson resisted these proceedings, on the ground that both he and Carter & Bonus, the ship-brokers, had come under advances and incurred liabilities on account of the ship, and that they were entitled to retain the certificate of registry, and also to prevent the freight and earnings of the ship from being paid over to the plaintiff, until their (Simpson's and Carter & Bonus's) claims were satisfied. The sum claimed by Simpson was 86*l.*, the greater part of which consisted of his wages for the voyage, and the remainder, of moneys expended for the use of the ship. Cart & Bonus claimed 95*l.* 10*s.* 2*d.* The magistrates refused to interfere. The four bills

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of exchange became due, and were dishonored; and on the 28rd of November, 1841, the plaintiff exercised the power of sale in his mortgage deed, and sold the ship to the defendant Hopper. The plaintiff being unable to procure a transfer to Hopper *of the certificate of registry, Hopper brought his action [*114] against the plaintiff upon the covenant in his purchase-deed for quiet enjoyment.

The bill was filed in July, 1842, and was twice amended. The original bill prayed, that Simpson and Carter & Bonus, or such of the same parties as had the custody thereof, might deliver the certificate of registry to Hopper. The amended bill contained a submission, on the part of the plaintiff, to allow such part of the claim of Simpson and Carter & Bonus as might be properly chargeable upon the freight in priority to the plaintiff's mortgage, to be paid thereout; and prayed that the certificate might be delivered over to the plaintiff, or to Hopper, or to the proper officer of her Majesty's customs; and that Simpson and Carter & Bonus might pay the costs of suit. In other respects the prayers of the two bills were substantially the same.

The plaintiff moved for a receiver, and upon that motion an order was made by consent, the plaintiff submitting, without prejudice, to pay the 95*l.* 10*s.* 2*d.* to Carter & Bonus, and a sum of 221*l.* 4*s.* 7*d.* to Simpson, all parties undertaking to abide by the order of the Court at the hearing, Simpson to deliver up the certificate of registry to the proper officer of the customs, who was to be allowed to cancel it, and Gould & Dowie to be at liberty to pay the freight (487*l.* 8*s.* 8*d.*) into court, and if the same should not be paid in by a certain day a receiver to be appointed. At the hearing,

Mr. Romilly and Mr. Heathfield, for the plaintiff, relied on the mortgage, as entitling the plaintiff to the freight which accrued in respect of the voyage: *Kerswill v. Bishop*,^(a) *Dean v. M'Ghie*.^(b) The master might, in *case of necessity, in a [*115] foreign country, hypothecate the ship, but he could not

(a) 2 Cro. & Jer. 529.

(b) 4 Bing. 45.

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acquire any lien on the certificate of registry, either for his wages or disbursements; *Smith v. Plummer*,^(a) Abbott on Shipping, Shee's ed., p. 145. Nor could the ship brokers acquire any lien upon the freight or the certificate of registry in respect of advances made by them to Ingo, having notice, as they had, of the plaintiff's title by virtue of the mortgage.

Mr. *Temple* and Mr. *Chandless*, for the defendant Simpson, the master.—The subject of the suit, the certificate of registry of a ship, is a matter in which this Court has no jurisdiction. It was distinctly laid down by Lord Hardwicke, in *Pierson v. Robinson*,^(b) that, as to a ship, "no remedy lies here *in rem*, the Admiralty only having jurisdiction against that." The certificate, which is the title-deed of the ship, must be equally within the exclusive jurisdiction of the same Court, except in so far as the statutes have given a summary jurisdiction to the justices of the peace: Stat. 3 & 4 Will. 4, c. 55, s. 27. There is no example of the interference of this Court for the recovery of the register, although there are reported cases in which the special jurisdiction of the magistrates has been resorted to, as it was in this case before the bill was filed: *The King v. Pixley*.^(c) In that case the decision of the Court is material, as showing that the legal right of the plaintiff, if he has any, is not that which the plaintiff demanded, but a right to have the document delivered up to the proper officer of the customs.

They also contended that there was enough upon the [*116] evidence to show that Carter & Bonus ought to be regarded as the general agent of the mortgagor, having been permitted by him to enter into the arrangements on behalf of Ingo, the registered owner, with respect to the charter-party, and that Carter & Bonus, as such agents, had entered into a special contract with Simpson for giving him the lien which he claimed.

Mr. *Rolt* and Mr. *Kenyon Parker*, for the defendants Carter &

(a) 1 B. & A. 575.

(b) 3 Swanst. 139, n.

(c) 13 East, 91.

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Bonus.—The plaintiff is, as to the freight, in the situation of a mortgagee, who had not taken possession when the freight became due. The mortgagee of a ship not in possession is no more entitled to her past earnings than a mortgagee of land is entitled to the past rents and profits. In practice, this difficulty is generally overcome by taking possession at some place at the entrance of the river, beyond the limits of the port of London, or of the other port to which the ship may be consigned. To perfect a right to the accruing freight the mortgagee must take possession of the ship before the conclusion of the voyage: *Kerswill v. Bishop*,^(a) *Briggs v. Wilkinson*.^(b) The plaintiff did not take possession of the *Ann M'Kenzie* until after she was in dock. The freight was then the property of Ingo, the mortgagor. Now, as against Ingo, the defendants Carter & Bonus had acquired a title by contract to the re-payment of the advances which they had made; and the title which they thus acquired is prior to that claimed by the plaintiff; for the plaintiff's right to the freight depended on his obtaining possession,—that is, upon something being done which had not then been done. The charter-party was the contract of Ingo; the payment of the freight is to be made to him, and it is in him, and not in the plaintiff, that the legal right to the freight is vested: *Splidt v. Bowles*.^(c) The *plaintiff will not be allowed, by now asserting his [*117] right to the freight, to defeat charges which Ingo had created upon it before the plaintiff's right attached.^(d) The advances of the brokers were, moreover, made without notice of the claim upon which the plaintiff now insists, for the indorsement on the certificate of registry referred to one bill of exchange of 600*l.*, and not to four bills of that amount. If the mortgage had been truly stated, the brokers would not have been induced to advance the moneys to Ingo, which they now claim to recover out of the freight in priority to the plaintiff.

It was also insisted, both on the part of the master and of the shipbrokers, that the plaintiff appeared by his bill to have parted

(a) 2 Cro. & Jer. 529.

(b) 7 B. & C. 30.

(c) 10 East, 279.

(d) 4 Bing. 739.

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with all interest in the ship and freight to Hopper, and therefore that he had no right to sue. On this point the case of *Rigby v. The Great Western Railway Company*(a) was cited. On the effect of the certificate of registry as evidence of the ownership against third persons, the cases of *Flower v. Young*(b) and *Pirie v. Anderson*(c) were also mentioned.

Mr. Willcock, for the defendant *Hopper*

Ingo did not appear, and a traversing note had been filed as against him.

VICE-CHANCELLOR:—The first question I shall consider is that which relates to the certificate of registry, and (not to confound together the numerous topics which were argued at the bar,) I will first consider this question as against Simpson [*118] son *only, omitting Messrs. Carter & Bonus, and will suppose (for the purpose of argument) that the plaintiff at the time of filing the bill was the mortgagee of the ship *Ann M'Kenzie*, no sale having taken place. Upon this hypothesis, what are the grounds on which Simpson justifies the detention of the certificate of registry?

That the law, in the absence of special contract, would give Simpson in this case a lien upon the certificate of registry for his wages, or for disbursements made or liabilities incurred on account of the ship, cannot be successfully argued. That there was any special contract between Simpson and the plaintiff, or Simpson and Ingo, giving a lien on the certificate of registry, has not been suggested. The detention of the certificate (as far as appears) arose out of advice given by a friend of Simpson's; and that detention appears to me to have been altogether indefensible on the part of Simpson, subject to the question, whether the plaintiff had such an interest in the certificate of registry as entitled him to require that Simpson should deliver it up at his request. In considering this latter question, I lay out of the case

(a) 2 Phil. 49.

(b) 3 Camp. 240.

(c) 4 Taunt. 652.

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the circumstance that the plaintiff did not uniformly require that it should be delivered to a particular party, that is, to the proper officer of customs. Nothing has ever turned upon that point, except in argument at the bar. The question between the plaintiff and Simpson always was, whether Simpson had a right to detain the certificate until his demand was satisfied, and not whether he should deliver it to one party or another.

It was said, however, that the instrument itself was of a nature which excluded the jurisdiction of the Court. No authority was cited in support of this argument; and although it may rarely happen that the proceedings of this Court are sufficiently rapid to induce *parties to resort to the jurisdiction, I [*119] can see no reason why the certificate of registry of a ship should be excepted out of the general jurisdiction of the Court to order documents to be delivered up. There are few instruments the actual possession of, or dominion over, which are of more importance than the certificate of registry of a ship. If that be so, the interest of the plaintiff, as mortgagee of the ship (which is the hypothesis I am now proceeding upon,) is sufficient to enable him to maintain the suit. This would sustain the plaintiff's case up to the 23rd of November, 1841,—the date of the sale to Hopper. But Simpson insists, that after that sale the plaintiff ceased to have any interest in the ship, and that at the time the bill was filed he had no such interest. That appeared to me (as I stated during the argument) to be a difficulty in the plaintiff's way, so far as the certificate of registry was concerned; but upon further consideration I have satisfied myself that, notwithstanding that sale, the plaintiff had still an interest in the certificate of registry sufficient to enable him to sustain the suit.

The plaintiff had sold the ship to Hopper, and covenanted for title and quiet enjoyment generally, and especially against Ingo by name. Simpson and Ingo (for the present I still omit Carter & Bonus) claimed an interest in the ship, and in the certificate of registry; and Hopper (whom I treat as a bona fide purchaser,) by reason of the dispute about these claims, was unable to obtain the possession of or dominion over the certificate of registry, and consequently was prevented from having the benefit of his pur-

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chase in the use of the ship. Upon this he brought his action of covenant against the plaintiff. Now the gist of the action was the detention of the certificate of registry; and if the [*120] plaintiff could procure that document to be delivered *up to the proper officer of customs, he would fulfil his contract with Hopper, and have a defence to the action. The question is, whether as vendor, (regard being had to his covenants,) he did not, after executing the bill of sale, retain a sufficient interest in the certificate of registry, as against the parties unlawfully detaining it, to entitle him, in fulfilment of his contract with Hopper, and for his own defence, to maintain a suit for that part of the relief. The conclusion to which I have come is that he did retain such an interest.

It was said, however, that if the plaintiff's case is right, and if Simpson could not lawfully detain the certificate, the plaintiff had a defence to Hopper's action;—that may be so as regards Simpson, although as regards Ingo, who is especially named in the covenant, the case may be different. Even as to Simpson, who insists that the detention was lawful, I think he ought not to be allowed to evict the plaintiff of his remedy here (if otherwise entitled to relief,) by suggesting that in argument which he denies upon the record. As against Simpson, I think the plaintiff, at the time he filed his bill, was entitled to have the certificate of registry delivered to the proper officer of customs.

Here an important question arises,—Carter and Bonus do not by their answer insist on a lien upon, or a right to detain the certificate, until their demand shall be paid; nor do they disclaim it. By their answer they say the certificate is then in the hands of Mr. Jordeson, their solicitor (who is also Simpson's solicitor,) as solicitor for Simpson. The counsel for Carter and Bonus, as I understood him, relied upon the possession of the certificate, as giving his clients, if posterior in time, priority in right. However I have thought it right to read the answer of Carter [*121] and Bonus, for the purpose *of seeing whether, according to their own representations of the case, they were or not parties (with Simpson) to the detention of the certificate; and the conclusion to which I have come is that they were so,

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and that I must upon this part of the case consider them in the same position with Simpson. [His Honor then stated other facts appearing on the evidence, which led to the same conclusion as to the part taken by Carter & Bonus with reference to the certificate; and remarked on its bearing on the question of costs on that part of the case.]

The next question relates to the freight. On this part of the case the plaintiff has submitted, without prejudice, to pay to Simpson, out of the freight, all moneys properly expended by him out of pocket, for the purpose of enabling the ship to proceed on her outward voyage, and also his wages, as falling within the category of expenses necessarily incurred in earning the freight. He submits also to pay to Carter & Bonus, out of the freight, all sums properly paid by them out of pocket for the like purpose. He makes this submission upon my suggestion that it was reasonable, whether it could be enforced or not; but he makes it under protest, and reserves to himself the right to withdraw it if the defendants should subject him to further litigation; and he resists altogether the claim of Carter & Bonus, to be paid out of the freight and earnings of the ship the 50*l.* advanced by them to Ingo before the ship sailed on the outward voyage. Except, therefore, for the purpose of deciding the claim of Carter & Bonus to the 50*l.*, and for the purpose of disposing of the costs of the suit occasioned by the claims of Simpson and of Carter & Bonus to be paid out of the freight and earnings of the ship—the payments which plaintiff now submits to make,—I have *no further question to decide. But for these purposes [*122] I must briefly notice the defendant's claim as to freight.

First as to the claim of Simpson. That he cannot support his claim of lien upon the freight upon any general rule of law, without special contract, was almost conceded, and is, I think, clear. If he has any such claim as he has set up, founded upon a special agreement with Ingo, he has given no evidence which I can look at in support of it, and I must disregard it.

The only remaining question respecting Simpson's claim is, whether he can justify it under an agreement express or implied with the plaintiff? The answer to this question in the negative

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will be found in the evidence. [His Honor stated the depositions on the subject.]

The claim of Carter & Bonus is not so easily disposed of. The plaintiff's mortgage on ship, freight and earnings, is dated the 16th of October, 1839, and was complete on the 20th of July, 1840. The advances, in respect of which Carter & Bonus claim a lien on the freight, were made on the 5th of August, 1840; and I think the effect of the evidence is—indeed their answer so represents it, that the cheque for 50*l.*, dated the 5th of August, 1840, and the certificate of registry, were actually exchanged the one for the other at the same moment. If that be so, I think they would be affected by such notice of plaintiff's prior claim, as the indorsement on the certificate of registry would give them; for, to say the least, they might, if necessary, have stopped the payment of the cheque in consequence of the notice conveyed by the indorsement: *although that would scarcely be necessary where the delivery of the cheque and of the certificate of registry were simultaneous.

Other objections, however, were raised. First, it was said that freight, being due under the charter-party, would not pass at law by mortgage of the ship, and that the indorsement on the certificate of registry did not mention freight, and *Splidt v. Bowles*(a) was cited. Admitting this, and not saying whether the possession taken of the ship, in January, 1841, would not in equity have entitled the plaintiff to a receiver, it appears to me that notice that the ship was mortgaged, especially in the case of brokers who knew of the charter-party, was sufficient to put Carter & Bonus upon inquiry, whether this mortgage of the ship, of which they had notice, did not include her freight, earnings, and profits. But, secondly, it was said, that the certificate of registry was calculated to mislead, and did mislead Carter & Bonus. The mortgage, it will be remembered, was in fact to secure four bills of exchange of 600*l.* each, and interest, and future advances; but the mortgage, as described on the indorsement on the certificate of registry, was stated to be for securing payment of "600*l.*

(a) 10 East, 279.

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and all sums of money which may hereafter become due." Upon this state of facts, Carter & Bonus have contended that the plaintiff cannot claim more, in priority over them, than one sum of 600*l.* together with further advances and interest.

It is not necessary that I should give an opinion, what, if in this particular case fraud or culpable negligence were imputable to the plaintiff, the decision **should* be. I cannot, [*124] upon the evidence, conclude that such was the case; but the contrary. [His Honor stated the evidence, and his conclusion that the omission in the indorsement, to mention more than one of the bills of exchange, was an error of the public officer.] How, in that case, will the matter stand? If the indorsement, though inaccurate, had not, to the extent of 600*l.* been definite, there would be no doubt upon the case. If a person knows that another has or claims an interest in property, he, in dealing for that property, is bound to inquire what that interest is, although it may be inaccurately described: *Taylor v. Baker.*(a) The question here is whether, by reason of the definite claim made as to the 600*l.*, the plaintiff is precluded from claiming more than the sum so defined, and subsequent advances?—whether, in fact, he is bound by his own representation, though made by mistake. If I am to consider Carter & Bonus as misled, to their damage and injury, by the error, it might be right, as between two innocent parties, that the one who misled the other should bear a loss occasioned by his own mistake. But if Carter & Bonus have not been to their damage and injury misled, there is no reason why the plaintiff's original priority should be taken from him. Now, in this case, although the indorsement does not correctly represent the details of the plaintiff's mortgage, it represents it as being of indefinite amount,—as liable to an indefinite increase. It is impossible, therefore, that Carter & Bonus can have relied upon having any specific amount of security, or intended to do more than take their chance. They made no inquiry, because no inquiry could have been of use,—the answer to inquiries would have been, there is no limit to **our* [*125]

(a) 5 Price, 306.

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right, except what the value of the freight and earnings may impose.

The plaintiff must pay Hopper his costs, and subject to that, the costs of suit must be paid by the defendants.

MORES *v.* MORES.

1848: 12th, 14th, and 17th Feb.

In a suit by a legatee claiming several legacies under the will and codicils of the testator, against the executor, naming as a defendant another legatee, who under one construction of a bequest would be entitled to an interest in one of the legacies claimed by the plaintiffs, the plaintiffs alleged by their bill that the other legatee so named as a defendant was out of the jurisdiction, but did not prove it; and, upon motions *ex parte*, supported by affidavits, that such other legatee could not be found to be served with process, obtained leave to file a replication, and afterwards to set down the cause against the defendants who had appeared and answered. At the hearing, the absence of the other legatee was urged by the executor as a preliminary objection to the hearing of the cause, but the Court heard the cause upon the questions of construction on the bequests in which the absent legatee was not interested, and reserved the consideration of the question as to the bequest, in which it was suggested that the absent party had an interest, directing that legacy to be brought into Court, and also directing an inquiry before the Master, whether the absent party was out of the jurisdiction.

Orders giving leave to the plaintiff to file a replication, and to set down the cause as against the defendants who had appeared and answered; upon affidavit that another defendant could not be found to be served with process, the plaintiff being unable to make the suit effectual against such other defendant under any of the General Orders of the Court.

THE testator by his will, dated in February, 1829, (among other things,) gave to trustees two closes of land, containing twelve acres, opposite Chingford church, in the county of Essex, and his leasehold estate therein described, and five 100*l.* bonds of the Stamford-hill and Green-lanes Trust, and a policy of insurance, upon trust, to call in and invest the moneys due and to be received in respect of the said five bonds; and to stand and be seised and possessed of the said hereditaments and premises and the said five bonds and the moneys to be produced therefrom,

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and the moiety of the money to be produced from the policy of insurance, upon trust, to pay and apply the rents and profits, interest, dividends, and proceeds thereof to and for the maintenance and support of his son, the plaintiff, William George Mores, during his life, to be paid to him at such time or times and in such manner as his said trustees should from time to time in their discretion think fit; and his will was that the *same should not be paid to any person under any as- [*126] signment to be made by his said son, or to any assignee under any insolvent act or commission of bankrupt, or under any execution or extent which might at any time be issued against his said son; and after the decease of his said son, upon trust, for Elizabeth and Selina, the testator's daughters. By a codicil, dated in 1840, the testator bequeathed to his son, Edward Rowe Mores, "in addition" to what he had already left him by his will, 600*l.* stock, Three per Cent. Consols, subject also to the same controlling powers, orders, restrictions, and directions of his trustees, as are appointed by his said will; and to his said son William George Mores, subject to the like control as exercised by his said trustees, in addition to what he had already left him by his will, a further bequest of 600*l.* Three per Cent. Consols, the same as his brother, and to the survivor of them; and in the event of both their deaths, to the sole use and behoof of the said Elizabeth and Selina. Some time after the date of the will, and before the making of the next, codicil, in 1842, the five 100*l.* turnpike bonds were sold by the testator. By a codicil, dated in 1842, the testator revoked the bequests made to the said trustees, gave and bequeathed unto new trustees the same policy of insurance, and the same closes of land and leasehold estate, and the said five 100*l.* bonds of the Stamford-hill and Green-lanes Trust, to hold the same unto the said new trustees, upon the same trusts as were declared by his will. By a codicil dated in 1844, the testator gave to his said son, William George Mores, subject to the like control, order, restrictions, and directions of his trustees, in addition to what he had already left him, his leasehold estate in Park-street, held under Lord Grosvenor, subject to a ground-rent of 24*l.* per annum; "and in the event of his

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death," to the sole use and behoof of the said Elizabeth [*127] *Mores and Selina Mores. The will was proved by Elizabeth Mores alone.

The bill was filed by William George Mores and a mortgagee of his interest under the will, against Elizabeth and Selina Mores, the trustees, and Edward Rowe Mores. The bill described the defendant, Edward Rowe Mores as "now residing in parts beyond the seas, out of the jurisdiction of the Court, but whose present residence the plaintiffs are unable to ascertain." The bill prayed an account of the personal estate and effects of the testator, and the application thereof, in a due course of administration; and that the rights of the plaintiff William George Mores, under the will and codicils might be declared and secured, and that Elizabeth Mores might be decreed to assent to the several legacies thereby bequeathed to him, and to transfer and pay the plaintiffs the legacy of 600*l.* Consols, and other the moneys to which the plaintiffs might be entitled. Process was prayed against all the defendants in the common form. The defendants, except Edward Rowe Mores, appeared and answered the bill. The last answer was filed on the 7th of March, 1847.

By an Order of the 8th of May, 1847, upon motion supported by affidavits, that the plaintiffs had not been able to find Edward Rowe Mores to serve him with a subpoena, the Vice-Chancellor of England gave the plaintiffs leave to file a replication against the defendants who had appeared and answered.(a) A wit-

(a) This order, and the subsequent order of the 10th of November, 1847, were obtained by the plaintiffs *ex parte*; and being considered by the Registrars of the Court as new in practice, both orders, before they were drawn up, were brought by the Registrar under the especial consideration of his Honor, the Vice-Chancellor of England, who was of opinion that they were orders which the circumstances of the case required, the plaintiffs not being able to suggest that the defendant had gone out of the realm to avoid service of process, or otherwise to bring the case within the general orders of the Court. The order of the 8th of May, 1847, was as follows:—"Upon motion this day made unto this Court by Mr. Beavan, of counsel for the plaintiff, it was alleged that it appears, by the affidavit of Thomas Gill, that the bill in this cause was filed on the 13th day of October last, praying, &c., (stating the prayer.) That the said Elizabeth Mores was the executrix of, and alone proved the will of the said testator Edward Rowe Mores, and the said Charles Hyde and James Catherwood were appointed trustees of the will of the said testator. That the said

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ness *called for the plaintiffs, deposed that he had [*128] made diligent inquiries to ascertain the residence of Edward *Rowe Mores, but had not succeeded; and that [*129] he believed him to be residing in some part of Jersey. On the 10th of November, 1847, the Vice-Chancellor of England, upon motion, gave the plaintiffs leave to set down the cause for hearing against the other defendants.(a) At the hearing,

Elizabeth Mores, Selina Mores, Charles Hyde, and James Catherwood duly appeared, and have filed their answers in this cause. That the said Edward Rowe Mores the younger was made a party to the said suit by reason of a bequest in the will of the testator as follows.—“I give and bequeath unto my said son, William George Mores, in my said will named, and subject to the like control as exercised by my said trustees, in addition to what I have already left him thereby, a further bequest of 600*l.* 3 per cent. Government Stocks, the same as his brother, (meaning thereby the defendant Edward Rowe Mores the younger,) and to the survivor of them, and in the event of both of their deaths to the sole use and behoof of Elizabeth Mores and Selina Mores, my daughters.” That deponent has made and caused to be made diligent inquiries from persons acquainted with the said Edward Rowe Mores the younger, to ascertain and discover the place of abode of the said Edward Rowe Mores the younger, to serve him with a subpoena in this cause, but that deponent has been unable to find out the place of abode of the said Edward Rowe Mores the younger, and has been informed that he had no settled place of residence. That deponent has made and caused to be made such inquiries as aforesaid from the said defendants, Elizabeth Mores, Selina Mores, Charles Hyde, and James Catherwood, and also of Messrs. Hyde, the solicitors to the said testator in his lifetime, all of whom have declared that they are ignorant of the place of abode of the said Edward Rowe Mores the younger. That the said plaintiffs are wholly ignorant of the place of abode of the said Edward Rowe Mores the younger. That although deponent has used due diligence for the purpose of serving the said Edward Rowe Mores the younger with a subpoena to appear in this cause, deponent has been unable to do so, and that deponent has no knowledge whatever of the place of abode of the said Edward Rowe Mores the younger. It was, therefore, prayed, that the plaintiffs may be at liberty to file a replication to the answers of the defendants, Elizabeth Mores, Selina Mores, Charles Hyde, and James Catherwood, which, upon hearing the said affidavit read, is ordered accordingly.”

(a) “Upon motion this day made unto this Court, by Mr. *Beavan*, of counsel for the plaintiff, it was alleged, that it appears by the affidavit of Thomas Gill, that on the 8th day of May last this Court, &c., (stating the order of that date,) grounded upon an affidavit made by deponent and filed in this Court, that although deponent had used due diligence for the purpose of serving the defendant, Edward Rowe Mores the younger with a subpoena to appear in this cause, he had been unable to do so: that on the 2d day of June last, in pursuance of the said order, deponent duly filed a replication to the answer of the said Elizabeth Mores, Selina Mores,

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[*130] *Mr. *Anderdon* and Mr. *Hallett* insisted, as a preliminary objection, that the defendant Edward Rowe Mores had not been proved to be out of the jurisdiction of the Court, and that in his absence the cause could not proceed.

Mr. *Romilly* and Mr. *Beavan*, for the plaintiffs.—The case is one in which the Court can make a decree in the absence of Edward Rowe Mores; he is not, in fact, interested in the relief which the plaintiff seeks: or if the Court should be of opinion that he has an interest, his rights may be saved under the 40th General Order of August, 1841; or the Court may make a decree as to the matters in which he has no interest: *Willats v. Busby*.(a) *Walley v. Walley*.(b)

Mr. *Anderdon*, in reply.—The 40th order has no application. We could not object that the bill was defective, for Edward Rowe Mores was made a defendant. A defendant out of the jurisdiction may now be made a party by compulsion; General Order XXXIII. of May, 1845. There is not, therefore, the difficulty which the Master of the Rolls lamented in *Willats v. Busby*.(c) And the decree of the Court in this suit will not preclude a new bill against the executrix at the suit of Edward Rowe Mores: *Waterton v. Croft*.(d)

Charles Hyde, and James Catherwood: that publication passed in this cause against the said defendants, Elizabeth Mores, Selina Mores, Charles Hyde, and James Catherwood, on the 28th day of July instant; that since the date of the last-mentioned order deponent had used due diligence and made many inquiries to ascertain the place of abode of the said Edward Rowe Mores the younger, for the purpose of serving the said Edward Rowe Mores the younger with the subpoena to appear in this cause, but had been unable to do so, and that he had no knowledge whatever of the place of abode of the said Edward Rowe Mores the younger. It was therefore prayed that the plaintiffs may be at liberty to set down the cause for hearing against the defendants Elizabeth Mores, Selina Mores, Charles Hyde, and James Catherwood, notwithstanding the defendant, Edward Rowe Mores the younger, has not appeared to and answered the plaintiff's bill, which, upon hearing the said affidavit read, is ordered accordingly."

(a) 5 Beav. 193; S. C., 3 Beav. 420.

(b) 1 Vern. 484.

(c) 3 Beav. 421.

(d) 6 Sim. 431.

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*VICE-CHANCELLOR:—Under the will and five co- [*131]
 dicils of the testator in the cause, or under some of
 those instruments, the plaintiff William George Mores, as legatee,
 and the plaintiff Beavan as assignee, by way of mortgage, of
 William George Mores, claim to be entitled for the life of Wil-
 liam George Mores,—1st, to certain closes of land and leasehold
 estate; 2nd, to five bonds of the Stamford-hill and Green-lanes
 turnpike trust; 3rd, to a moiety of the money to be received
 from a policy of assurance; and 4thly and 5thly, to two legacies
 of 600*l.* consols each; and 6thly, to a legacy of 50*l.* cash.

The defendant Elizabeth Mores, the executrix, and the defen-
 dant Selina Mores raise questions upon the construction of the
 testator's testamentary papers, or some of them, adverse to the
 plaintiffs. Questions also arise upon the construction of the same
 papers on the part of Edward Rowe Mores adverse to the plain-
 tiff's claim to one of the legacies of 600*l.* consols. The plaintiff's
 claim to the other legacies is unfettered by any claim on the part
 of Edward Rowe Mores. The legacy of 50*l.* has been paid to
 the plaintiff William George Mores; the other five legacies are
 unpaid. On the hearing of the cause, an objection was taken by
 the defendant Elizabeth Mores, the executrix, that Edward Rowe
 Mores was not proved to be out of the jurisdiction, and that
 therefore the hearing should not proceed. To meet this difficulty
 the plaintiffs contended, first, that, although he had been named
 a party, the points taken in his favor upon the construction of
 the testator's will were so clear as not to raise a *probabilis causa*
litigandi, and that I might safely decide against him in his absence,
 —secondly, the plaintiffs offer to confine the suit to
 the four unsatisfied claims, as to *which it is admitted [*132]
 that all persons interested are parties. This was ob-
 jected to, upon the ground that it would subject Elizabeth Mores
 to a second suit with reference to the same will,—thirdly, the
 plaintiffs offered to waive a present decision of the Court as to the
 600*l.* consols, in which Edward Rowe Mores is said to be interest-
 ed; and that that sum should be brought into court, not to be paid
 out without notice to Edward Rowe Mores; and the decision
 of the Court to be confined to the remaining points. This also

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was objected to, partly, as I understood, upon the ground that the plaintiffs had a right to have all the points arising under the will decided simultaneously or at the same hearing, and partly upon the ground that the order proposed would be an irregularity in practice.

I have omitted to mention what is extremely important,—that assets are, in effect, admitted to pay the plaintiff's claims, if he shall establish them, and that the executrix does not require any account to be taken.

The first point made by the plaintiff I had no hesitation in rejecting. With respect to the remaining points, I thought it right to consider them before the points arising between the plaintiffs and the parties other than Edward Rowe Mores were argued; and it is upon those points I am now to observe. The second and third, as points of strict practice, are sufficiently intelligible. But no resources that I possess have enabled me to discover any moral reason why an executrix, whose duty it is to carry into effect the trusts of the will with all convenient speed, should raise them in the present case. If accounts were to be taken, the objection might not be improper in a trustee, for if the assets were found insufficient, the executrix might be liable to have [*133] the accounts taken a second time in *another suit by Edward Rowe Mores. But as this is not the case, I do not see how the defendant can be put to inconvenience, (injury is out of the question,) by my now deciding the points in which the parties interested are present, and which are ripe for decision. How can my so deciding subject the defendant to additional litigation? Am I to dismiss this suit? If so, another suit, if not two, must succeed it; for I do not expect to hear from the defendant, the executrix, that she can execute the will without the directions of the Court. The second course suggested by the plaintiffs would obviously be more merciful to the executrix than a decree dismissing the bill. But the third course, unless the Court should itself object to it, is obviously the course best adapted to meet the defendant's difficulty; for, although it will not absolutely prevent Edward Rowe Mores filing a new bill (that cannot now be prevented,) such a course on his part is high-

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ly improbable, when he finds the property he claims set apart in court, with liberty for him to apply for it. The executrix, however, insists upon her right to decide for herself what course she shall take, and I must therefore enter upon the question raised.

Three courses present themselves:—first, I may dismiss the bill as in a case in which the plaintiff has brought his cause to a hearing in a state in which it cannot be heard. This may be done where justice requires it. It is discretionary. Secondly, the Court may order the cause to stand over, that the plaintiff may supply the deficiency in his proof, or direct inquiries before the Master, reserving all the points in question in the cause. The mere regularity of these courses cannot be doubted. Or, thirdly, I may decide the points now ripe for decision, and, having done so, *I may order the cause to stand [*134] over, as in the case last suggested. Upon the strict regularity of this course I will admit that a question may arise.

In order that I may be clear upon the points which arise, and who are the parties interested in them, I will hear the case upon merits before I finally decide upon the course to be taken.

The questions of construction were argued. It was admitted, that, under the codicil of 1840, upon which the questions arose in favor of Edward Rowe Mores, the plaintiff possibly had an interest

The VICE-CHANCELLOR held, that the five bonds were clearly specific in the will,—that they were clearly adeemed by being paid off,—and that the codicil appointing new trustees could not have the effect of giving the plaintiff other five bonds. Upon the question arising under the codicil, he said that the words “subject to the same controlling powers, &c. of my trustees,” plainly referred to the discretionary powers ineffectually attempted to be given to them by the will, and not to the limitations upon which the trustees were directed to hold it,—that the words “in addition” referring to a previous legacy to William George Mores would not, *per se*, include a limitation over to Ed-

1848.—*Mores v. Mores.*

ward Rowe Mores,—that the words “in the event of his death,” in the codicil of 1844, bequeathing the leasehold house in Park street,(a) clearly expressed a contingency,—that it had [*135] *been decided, that such words (standing alone) pointed at the contingency of the legatee dying in the lifetime of the testator, a contingency against, which, in dispositions to children, it was usual as well as reasonable to provide,—that the testator had given to this legatee an absolute interest in one legacy,—where he intended to give a life interest he had expressed it in terms,—and there was nothing but speculation to lead the Court in construing the words, “in the event of his death,” to mean “from and after his death.”

The VICE-CHANCELLOR then proceeded—With respect to the point of practice, I shall refer it to the Master, to inquire as to the absence of Edward Rowe Mores, which, in questions respecting parties, is a regular course. The question is, what is to be done in the meantime: The case is this:—A defendant is named as a party in respect of an interest distinct from four out of five questions in the cause, but is not brought to a hearing. I cannot decide the case as regards him without inquiry. The remaining four questions are ripe for decision. Is the practice of the Court so stringent that I am compelled to postpone the decision of the four points which are confessedly ripe for decision until after an inquiry has been made which has no connection with them,—or may I not decide the four points, and let the fifth only be reserved for the inquiry which that point alone requires? Will such a course injuriously affect the defendants? The answer is, that so far from being an inconvenience, it will, if it has any effect, protect the defendants against the inconvenience which the rule they rely upon is intended to prevent. As far as regards the absentee, it is absolutely inoperative. The case is the same as if there were no dispute about any of these four legacies, [*136] and they all *were pecuniary legacies. The money, in that case, would come into court, including the legacy in

(a) *Supra*, p. 126.

 1847.—*Simes v. Eyre*.

which Edward Rowe Mores is supposed to have an interest; for in that legacy it is admitted that the plaintiff might have an interest. If the money was in Court, would it be absolutely imperative upon the Court to leave it there until inquiries, wholly unconnected with it, should be answered, only in order that all questions might be simultaneously disposed of? Without disputing the general rule relied upon, I think I am at liberty to dispose of this case so far as relates to the points in which Edward Rowe Mores has no interest, reserving the question in which he is interested until the result of the inquiry shall be known.

DECLARE the plaintiff entitled for his life to the two closes of land and leasehold estate at Chingford, and to an absolute interest in the leasehold premises in Park street, and to the interest accrued due on one legacy of 600*l*. The two legacies of 600*l* stock to be paid into court, and the interest on one of such sums, and a half of the moneys in court produced by the policy of insurance to be paid to the plaintiff, the mortgagee. Reference to the Master to inquire, whether Edward Rowe Mores was, when the bill was filed and from that time had been, out of the jurisdiction of the Court. Reserve further directions and costs Liberty to apply.

**SIMES v. EYRE*.

[*137]

1847: 8th March.

A marriage settlement made in 1811, recited that the husband was entitled to 20,000 rupees, secured by a note of the East India Company; and 10,000 rupees, part thereof, were thereby assigned (with certain property of the wife) to the trustees of the settlement, upon trust, for the husband and wife for their lives, with remainder for the children of the marriage. One of the trustees died six weeks after the settlement was made. The husband died in 1819, and the wife in 1822. The trustees did not, nor did the survivor, take any step during the lifetime of the husband to recover the 10,000 rupees. After they had attained their ages of twenty-one years, the children filed a bill against the surviving trustee and the representatives of the deceased trustee, for an account of the trust-funds, charging them with the 10,000 rupees. Under a reference to the Master, to inquire whether the defendant might, by due diligence, have received or got in the 10,000 sicca rupees, the defendant produced evidence, showing it to have been the common belief of persons who knew the husband, that he was not possessed of any such property, but no proof was given that the husband was insolvent;

 1847.—*Simes v. Eyre*.

and the Court charged the surviving trustee with the fund, and interest from the death of the wife, and directed a reference to inquire the value of the 10,000 rupees at the time of the settlement.

The representative of the trustee who died six weeks after the making of the settlement was not a necessary party.—such trustee not having possessed any part of the trust-funds, and not being chargeable with the default.

By an indenture, dated the 6th of July, 1811, made between John Wright of the first part, Jane Wells of the second part, and W. P. Bosville and C. W. Eyre of the third part, reciting the then intended marriage of John Wright and Jane Wells, and that John Wright was entitled to 20,000 sicca rupees, secured by a note of the East Indian Company, dated the 1st of April, 1805, together with interest for the same, and to other personal property, and that Jane Wells was entitled to certain canal navigation shares, and 1333*l.* 6*s.* 8*d.* consols; and that upon the treaty for the marriage it was agreed that John Wright should assign over 10,000 sicca rupees to, and invest the 1333*l.* 6*s.* 8*d.* consols in the joint names of W. P. Bosville and C. W. Eyre, upon the trusts therein mentioned; and reciting that the 1333*l.* 6*s.* 8*d.* consols had been transferred into the joint names of W. P. Bosville and C. W. Eyre, and that it was further agreed that the said Jane Wells should assign to them two of the said shares: it was witnessed, that, in pursuance of the said agreement, the said John Wright had bargained, sold, and assigned unto the said W. P. Bosville and C. W. Eyre the said 10,000 sicca rupees (part of the 20,000 rupees secured by the said note,) upon the trusts thereafter mentioned; and Jane Wells thereby assigned [*138] ed the said two shares to the same *trustees, upon the trusts thereafter mentioned; and the trusts was therein after declared, of the 10,000 sicca rupees, 1333*l.* 6*s.* 8*d.* consols, and canal shares, for the benefit of the said John Wright for his life, remainder to the said Jane Wells for her life, and from and after the decease of the survivor of them, for the children of the marriage, in equal shares. The settlement contained powers for the investment of the 10,000 sicca rupees in Government funds or real estate; and it also contained the usual clauses for the protection and indemnity of the trustees.

1847.—*Simes v. Eyre*.

The marriage took place on the 6th of July, 1811. Both of the trustees accepted the trusts. W. P. Bosville, one of the trustees, died in the month of August, 1811. John Wright died in 1819, and Jane, his wife, died in 1822. The plaintiffs, the children of the marriage, filed their bill, in 1839, against C. W. Eyre and the personal representatives of W. P. Bosville, praying an account of the trust-funds, including the 10,000 sicca rupees, and if that sum had not been invested, that the defendants might be decreed to account for the same, with interest from the death of the widow.

The defendant C. W. Eyre, by his answer, said that no note of the East India Company had come to his hands,—that he believed there was no estate or property of John Wright, out of which the payment of the moiety of the said 20,000 sicca rupees could have been enforced; and that the trustees had executed the settlement on the representation that they would be liable for no more than should come to their hands.

At the hearing of the cause in May, 1844, the defendant C. W. Eyre insisted that no proof had been given of the existence of the note, or the fund; but the *Court hold- [*139] ing that there was ground for a decree, a reference was directed to the Master, at the request of the defendant C. W. Eyre, to inquire whether he solely, or with the concurrence of W. P. Bosville, deceased, might by due diligence have received or got in the 10,000 sicca rupees mentioned and comprised in the settlement, and expressed to be thereby assigned, or any part of the same, with liberty to state special circumstances. Evidence was given before the Master, that John Wright was the son of persons in poor circumstances, and not generally believed to be in the possession of any property. The Master found that John Wright, the father of the said plaintiffs, lived eight years or thereabouts after the date of the indenture of settlement by which the said trust-funds were assigned, and that the defendant C. W. Eyre, did not during the whole of that time take any steps or proceedings to receive or recover the said sum of 10,000 sicca rupees, or any part thereof; and, upon consideration of the several states of facts and evidence before him, he was of opinion, and certified,

1847.—*Simes v. Eyre*.

that the said C. W. Eyre solely might, by due diligence, have received or got in the said sum of 10,000 sicca rupees comprised in the settlement, and expressed to be thereby assigned. The defendant C. W. Eyre excepted to the report, and the case was heard upon the exception, and also upon further directions.

Mr. *K. Parker* and Mr. *Sandys*, for the defendant Eyre, in support of the exceptions.—This was a case in which the Court would not make the defendant answerable for moneys which there was no evidence (except from the terms of the recital in the settlement) had ever actually existed. The settlement itself did *not express that the trustees had been put in possession of the note of the East India Company which it referred to; and not being in possession of the note, they had no legal power of recovering the sum thereby secured. Was it, in these circumstances, their duty to have filed a bill against their cestui que trusts,—and that, moreover, in a case in which they had every reason to believe that the suit would be entirely fruitless, and had no funds in their hands (except the dividends of the 1833*l.* 6*s.* 8*d.* stock, and of the canal shares) to meet the expenses of such a proceeding?

Mr. *Anderdon* and Mr. *Faber*, for the personal representative of W. P. Bosville, submitted that, as it appeared the deceased trustee had died about six weeks after the making of the settlement, he could not be charged with default in not having recovered the 10,000 sicca rupees, in a case in which it was admitted that the money could not have been compulsorily recovered except by a suit in equity.

Mr. *Romilly* and Mr. *Bigg*, for the plaintiffs, submitted that, inasmuch as the bill was filed before the publication of the General Order XXXII., of August, 1841, the representative of the deceased trustee was, under the former rule of the Court, a necessary party.

The VICE-CHANCELLOR said, that by the form of the refer-

 1847.—*Simes v. Eyre*.

ence to the Master, the existence of the fund of 10,000 rupees had been assumed. If the trustees had sued Wright in respect of that fund, it would not have been competent to him, having executed the settlement, to have denied the existence of the note. In answer to *the charge of want of pro- [*141] per diligence, the trustee might in this suit have shown that Wright was insolvent, or that the money could not have been recovered; this the defendant had failed to do, and the exception must be overruled.

As against the representative of Bosville, the bill must be dismissed with costs. He could only be a necessary party as being a trustee, or as the executor of a deceased trustee, liable to account in respect of the trust-funds come to his hands. The representative of Bosville was not a trustee of the fund, for the defendant Eyre had survived; nor was the estate of Bosville liable in respect of this fund, for Bosville having died six weeks after the settlement was made, could not be said to have been in default in respect of that part of the trust fund which consisted of the 10,000 rupees, and no other part of the trust funds had come to his hands, or to the possession of his representatives.

REVER it to the Master to inquire what was the value of the 10,000 sicca rupees in July, 1811 (the date of the settlement,) and direct the defendant Eyre to pay the amount so to be ascertained with interest at 4 per cent. from the death of the widow, and the costs. Dismiss the bill as against the representative of W. P. Bosville, with costs.

 1846.—Hughes v. Lipscombe.

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*HUGHES v. LIPSCOMBE.

1846: 25th Nov.; 1st and 2nd Dec.

A bidder at a sale under a decree of the Court, who is not a party to the cause or interested in the estate which is the subject of the sale, has no right to apply to the Court to set aside a sale to another bidder, on the ground of irregularity in that the latter, although reported the purchaser, was not, in fact the highest bidder. Whether he may apply to be declared the purchaser in the place of the bidder reported to be the best purchaser, *quære*.

A CREDITOR'S suit. A decree for (among other things) the sale of real estate, under a power in the mortgage-deed, the testator having been the mortgagee of the property. The mortgagor attended at the sale, and, after a bidding by one Finch, of 395*l*. for lot 8, the mortgagor bid 400*l*. as the agent (as he afterwards stated) of a Mr. Gyles. The solicitor of the plaintiff, who conducted the sale, refused to accept the bidding of the mortgagor, on the ground that he believed him not to be a person of sufficient property. Whether the mortgagor, at the time, stated that he was the agent of Gyles was a fact upon which the affidavits were conflicting; but his bidding was not accepted, and the lot was knocked down to Finch; and the Master reported Finch the best purchaser of lot 8, at the price of 395*l*.

Mr. *Cole*, for Gyles, moved that the sale of lot 8 to Finch might be set aside for irregularity; or that the biddings for the same might be opened, he (Gyles) being willing to give 50*l*. more for the premises. He said that the order of the Court which directed the sale to be made to the highest bidder or best purchaser had not been obeyed. In every sale under the direction of the Court it was essential that the terms of the decree or order should be pursued, or the sale was not allowed to stand: *Ord v. Noel*, (a) *Cobclough v. Sterum*, (b) 1 Sugd. V. & P. pp. 102, 111, 113, 114, 10th ed.

(a) 5 Madd. 438.

(b) 3 Bligh, N. S., 181.

1846.—Hughes v. Liscombe.

Mr. *Romilly*, for the plaintiff, supported the second part of the motion, that the biddings might be opened, *but [*143] asked for the costs of the motion so far as it related to the first part of the application, as to setting aside the sale, with respect to which the affidavits had been filed. Gyles not being a party in the cause could not be heard on that point. The second part of the motion would have been granted of course, without any conflict as to the facts, upon the usual terms. In all sales under the direction of the Court some discretion was given to the parties conducting them: they would not be bound to accept the biddings of an idiot or a pauper.

Mr. *Giffard*, for Finch the purchaser, on the report, asked for his costs of the motion, as of an experiment not warranted by the practice of the Court. The purchaser was the accepted bidder, and the Court would protect him from any costs resulting from a dispute between the plaintiff and another bidder at the sale.

Mr. *Cole*, in reply.—The alleged purchaser, Finch, has notice of what occurred at the sale; he, therefore, knows that he is not the highest bidder, and does not come within the terms of the decree. Gyles incurred the expense of attending, by his agent, at the sale; he relied on the conditions of sale, that the highest bidder would be allowed the purchaser. He is entitled to apply to the Court to enforce the observance of good faith, by compelling the parties who conducted the sale to adhere to the conditions which the Master had approved. With respect to the costs of the motion, the justice of the case will be, that the costs of setting right the irregular proceeding should be borne by the plaintiff, or his solicitor, who occasioned the irregularity.

The VICE-CHANCELLOR said, that the only question was, who was to pay the costs of opening the biddings, *and that he was of opinion Gyles should pay them,— [*144] that in all cases in which a sale before the Master had been set aside for irregularity, that had been done at the applica-

1846.—Hughes v. Lipscombe.

tion of the parties in the cause, or some of them, or of some person interested, and not on the motion of a stranger. If the Court, on this motion, were to set aside the sale which had been approved by the Master, it would not necessarily follow that, upon a re-sale, the party by whom the motion was made would become the purchaser, and the estate might be left without a purchaser. The notice of motion did not even ask that Gyles, the party moving, might be declared a purchaser in the place of Finch; and if it had asked the Court to declare Gyles the purchaser, at his bidding of 400*l.*, when by the same motion he stated his willingness to give 50*l.* more, the costs of the motion must have been paid by Gyles. What interest had Gyles which could entitle him, on the ground of irregularity, to apply for the purpose of forcing his offer upon the parties, if they were satisfied with the offer which had been accepted? If Gyles had applied simply to set aside the sale, without the alternative motion, the application must have been refused; and the result must have been the same if he had made that application knowing that another person had at the same time applied to open the biddings. The circumstance that Gyles himself made a motion comprehending in the alternative both objects did not, in substance, alter the case. He must pay the costs, and have liberty to open the biddings on the usual terms, advancing 50*l.*

1848.—Fitch v. Weber.

*FITCH v. WEBER.

[*145]

1848: 7th 8th 9th and 15th March.

The testatrix devised and bequeathed her real and personal estate in trust, as to the real estate, for sale, as soon after her decease as conveniently could be, and declared that the trustees should stand possessed of the proceeds of the sale as a fund of personal and not real estate, for which purpose such proceeds or any part thereof, should not, in any event, lapse or result for the benefit of her heir-at-law; and, after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects as she should, by any codicil to that her will, direct or appoint. The testatrix made no codicil:—*Held*, that the heir-at-law was entitled to the proceeds of the real estate undisposed of by the will.

THIS case is reported on the exceptions to the finding of the Master on the question, who was the heir-at-law of Anne Taylor?(a) The cause now came on for further directions, and the principal question was, whether, according to the true construction of the will, the heir-at-law or the next of kin of the testatrix took the proceeds of the sale of the real estate, undisposed of by the will.

The will was dated in September, 1839, and, after giving thereby various legacies out of her personal estate to charities, the testatrix proceeded,—“I give, devise, and bequeath, all my messuages, warehouses, lands, tenements, and hereditaments, and all other my real and personal estate, whatsoever and wheresoever, unto my friends, B. Thomas and P. E. Weber, their heirs, executors, administrators, and assigns, according to the nature and quality thereof respectively, upon trust, that they, my said trustees, or the survivor of them, or the trustees or trustee for the time being of this my will, do and shall, with all convenient speed after my decease, collect and get in all moneys due and owing to me, and make sale and dispose of all my said messuages, warehouses, lands, tenements and hereditaments whatsoever and wheresoever, and also of such parts of my personal estate as shall be of a saleable nature, either by public auction or private sale.” [Powers of sale, and to give sufficient receipts for the purchase-

(a) *Supra*, p. 51.

1848.—Fitch v. Weber.

money.] "And I declare that my said trustees or trustee shall stand and be possessed of the proceeds to arise [*146] *from the sale of my said messuages, lands, tenements, and hereditaments, as a fund of personal and not real estate; for which purpose I declare that such proceeds or any part thereof, shall not, in any event, lapse or result for the benefit of my heir at-law. And out of such proceeds and other my personal estate, after payment out of such last-mentioned personal estate of the charitable legacies aforesaid, I direct the payment and investment of the several legacies hereinafter expressed." The testatrix then gave many legacies, and directed that the legacy duty should be paid by her executors out of the proceeds to arise from the sales thereinbefore directed, and other her personal estate. And the testatrix added,—“And as to the residue of my estate and effects not hereinbefore specifically bequeathed, I direct my said trustees or trustee to pay and apply the same to such person or persons, for such uses, and upon and for such trusts, intents, and purposes as I shall by any codicil to this my will duly executed direct and or appoint.” The testatrix made no codicil; she died soon after the date of her will, and the will was proved by P. E. Weber in November, 1839. The suit was instituted for the administration of the trust. The state of the family of the testatrix, and the relation of the parties in the cause, appear upon the tabular pedigree inserted in the former report.(a)

Mr. *Walker* and Mr. *Hardy* for the next of kin who were plaintiffs, and Mr. *Rolt* and Mr. *Roundell Palmer* for the next of kin who were defendants, appeared in support of the claim of the next of kin to the surplus proceeds of the estate after satisfying the legacies.

Mr. *Wood* and Mr. *Rogers*, for the heir-at-law appeared [*147] *in support of his title to the proceeds of the real estate which remained after satisfying the legacies. •

(a) *Supra*, p. 52.

 1848.—*Fitch v. Weber*.

The reported cases referred to in the judgment, where there was a like question between the heir-at-law and the next of kin, with regard to the proceeds of real estate undisposed of, were cited, as was also *Flint v. Warren*, before the Vice-Chancellor of England, on further directions, February 28, 1848,(a) in which his honor decided in favor of the heir-at-law.

The VICE-CHANCELLOR (in the course of the argument) referred to the cases of *Smith v. Claxton*,(b) and *Robinson v. Taylor*,(c) and said,—that the next of kin were claiming property of the testator which, at his death was real estate, and that, in order to substantiate that claim, they must make out from the will that there were devisees of the property,—that not being mentioned in the will, they must make out a devise by implication, which might be sufficient, although Lord Thurlow, in *Robinson v. Taylor*, had said he “did not see how the personal representatives could get at that which was not personal estate at the death of the testator but by express words,”—that the law was to some extent clear upon authority,—that a devise upon trust to sell and convert real estate into money was, in some sense, a direction to turn real into personal estate; but it was clear that such a devise would not necessarily entitle the next of kin to claim any portion of the proceeds of the sale of real estate which, by the terms of the will, or in event, was or became undisposed of. The will in that *case might determine the quality in which the [*148] property would devolve upon those who took it, but was silent as to the persons upon whom it should devolve. The testator clearly meant the real estate to become money *after* his death, but (as Lord Thurlow said in the case referred to) the question was, whether he meant it to be the same as if it had been money *before* his death. Any purpose, however limited, (as payment of costs,) apparent upon the face of the will, with reference to which the conversion might have been directed, was conclusive against the claim of the next of kin: *Hill v. Cock*.(d)

(a) Reported on the hearing, 14 Sim. 554. See 1 Jarman on Wills, 502, *et seq.*

(b) 4 Madd. 484.

(c) 2 Bro. C. C. 589.

(d) 1 Ves. & B. 173.

1848.—*Fitch v. Weber*.

The heir-at-law might take the proceeds as personal estate, but *he* would take it: *Smith v. Claxton*.^(a) In the simple case of a devise upon trust to sell, and no trust of the surplus declared, it had apparently been thought by some text-writers^(b) that the Court would be driven to imply a trust for the next of kin; but that had never been so decided, and if ever such a case should call for decision, it might deserve much consideration. However clear, in such a case it might be that the testator meant his real to be treated as personal estate *after* his death, the question remained, did he mean it to be treated also as if it had been personal estate *before* his death?—that (as Lord Thurlow observed) was the question. It might be strange that a testator should care in what quality his heir-at-law took the estate which descended upon him; but if an intention to disinherit the heir in favor of the next of kin were present to the mind of the testator, was it not equally strange that he should not say so? To decide that such a devise was equivalent to a devise of the land to the next of kin might, perhaps, be thought to savor as much of conjecture as of implication.

[*149] *At the close of the argument,

The VICE-CHANCELLOR said, that, if it were not for the words in Ann Taylor's will which in terms excluded the heir-at-law, at least for some purposes, he should have had no hesitation in deciding the present case in favor of the heir; but as that clause required consideration, he would reserve the expression of his opinion until he was prepared to decide the whole case.

March 15th.—The VICE-CHANCELLOR:—The property to which the question relates was real estate at the death of the testatrix, and, therefore, the onus is upon the next of kin to show a devise in their favor. This is the test by which, according to cases of the highest authority, the rival claims of the heir-at-law and next of kin must be decided. I will first consider the case,

(a) 4 Madd. 484.

(b) 1 Roper Leg. 456, 3d ed.

1848.—Fitch v. Weber.

omitting the clause which to some extent at least excludes the heir, and then consider the effect of that clause.

In considering the case under the former aspect, I omit, in the first place, the words which directs the trustees to stand possessed of the property "as a fund of personal and not real estate." In that case the authorities are too clear to make citation of any necessary. The will may determine in what quality the property shall be taken by those upon whom it shall devolve, but does not determine who are the persons to take; and the original right of the heir-at-law must prevail. Omitting the cases, *Countess of Bristol v. Hungerford*,^(a) and **Phillips* [*150] *v. Phillips*,^(b) the next of kin have no reported case which supports their claim upon a devise by implication. The former of these cases, it was admitted, could not be relied upon, for the same individuals were both heirs-at-law and next of kin, and the decree declares their title as "heir-at-law and representatives" of the testator. In *Phillips v. Phillips*, the decision turned upon the direction in the will, that the surplus proceeds of the real estate should be "deemed part of the testator's personal estate. *Jessopp v. Watson*"^(c) (decided by the same learned judge who decided *Phillips v. Phillips* and *Amphlett v. Parke*,^(d)) is an authority that, in the absence of the direction that the surplus proceeds of the real estate should be deemed personal estate, those proceeds would go to the heir-at-law.

The next question then is upon the effect of the declaration, that the proceeds of the sale of the real estate shall be "a fund of personal and not of real estate," a form of expression which is perhaps less favorable to the claim of next of kin than if the testatrix had said it should be part of her personal estate. In *Amphlett v. Parke* and *Phillips v. Phillips* such expressions occurred. Sir J. Leach decided both cases in favor of the next of kin. The former was reversed, on appeal, by Lord Chancellor Brougham; the latter has never been reviewed on appeal. But *Collins*

^(a) 2 Vern. 645; 3 P. Wms. 194, in note upon *Rogers v. Rogers*; Prec. in Chanc. 81; 1 Eq. Abr. 244; Pl. 44, S. C.

^(b) 1 Myl. & K. 649.

^(c) Id. 655.

^(d) 1 Sim. 275.

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v. *Wakeman*,^(a) (notwithstanding the criticisms at the bar,) is, I think, an authority against the effect attributed by Sir J. Leach to the words I am now considering. I think also it is impossible to read the judgments of the Lord Chancellor in *Cogan* [*151] v. *Stephens*^(b) and in *Williams v. Williams*,^(c) *without discovering in both the clear expression of his disapprobation of the decision in *Phillips v. Phillips*. The reasoning of Lord Langdale in *Johnson v. Woods*^(d) precludes the supposition that he could do otherwise than dissent from *Phillips v. Phillips*. In *Flint v. Warren*^(e) in which the testator directed proceeds of real estate to be deemed part of his personal estate, the Vice-Chancellor of England decided, on further directions,^(f) that the heir was entitled to the surplus proceeds of the real estate. *Phillips v. Phillips* was cited before him; but, according to the note with which I have been furnished the Vice-Chancellor said, that if he decided otherwise than in favor of the heir, he should be doing violence to a settled principle of law. In *Gordon v. Atkinson*^(g) the same expressions occurred; *Phillips v. Phillips* was cited, but the Vice-Chancellor, Knight Bruce, also decided against that case. And if the expression of my opinion could add anything to the weight of these authorities, I would ask (the question being whether the will contains a devise by implication to the next of kin) how it is possible that such an implication can be found in a will, every disposition in which is hostile to the next of kin, as much as to the heir-at-law. With respect to the rest of the cases, I agree with Mr. Wood, that they may safely be dealt with as establishing the undisputed proposition,—that the Court must give effect to any legal devise a testator may make; and as material only so far as they may show in what way the principle has been applied in cases similar to that before the Court.

The decision in this case must, in my opinion, depend wholly upon the effect to be given to the words, “for

(a) 2 Ves. jun. 683.

(b) 1 Beav. 482, n.

(c) M. R., 11th Dec. 1835; 5 Law J., N. S., Chanc., 84.

(d) 2 Beav. 409.

(e) 14 Sim. 554.

(f) 28 Feb. 1848.

(g) 19 July 1847.

1848.—Fitch v. Weber.

*which purpose I declare that such proceeds, or any part [*152] thereof, shall not in any event lapse or result for the benefit of my heir-at-law." Now what would have been the effect of this clause if the testatrix had made a codicil, disposing of the whole fund, and the devisee had afterwards died in his lifetime? I will admit that at the close of the argument I was under impressions favorable to the claim of the next of kin; and much trouble and anxiety it would have saved me to have retained the impression I then had; but I am satisfied that I should be giving an undue effect to the words in question if I were to found upon them a gift by implication in favor of the next of kin. To explain my view of the case, I set out by assuming that the previous words of the will, directing that the proceeds shall be personal estate, do not amount to a gift by implication to the next of kin. The argument, then, of the next of kin must be, that the intention to exclude the heir makes the previous words of the will express more than those words in their common signification would import. This must be the argument, for nothing can be more clear than that the mere intention to exclude the heir will be void, unless there be a gift to some one else. Is the meaning thus sought to be infused into the previous words of the will necessarily implied in the clause excluding the heir? What, in the first place, is the purpose for which the testatrix says she excludes the heir? It is simply that the real estate may be made a fund of personal estate. But that purpose will not *per se* disinherit the heir, except for the purposes of the will; and if the purposes for which the heir-at-law is excluded may be taken as the measure of the intended effect of the exclusion, the clause will disinherit the heir for the purpose of the will, but no further.

Again: suppose the testatrix to have added the words

* "but shall fall into the residue;" such words would, I [*153] apprehend, have put the claim of the next of kin out of the question. It would then have been plain that the purpose of the testatrix was to provide that lapsed legacies should fall into the residue, so as to give the whole to her legatees (particular or general) to the exclusion of the heir; but not to prefer the

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next of kin to the heir in cases not affected by her testamentary dispositions—in other words, to disinherit the heir for the purposes of the will, but no further.

Is it necessary, then, to carry the effect further? This point was put by Mr. *Walker* in the strongest possible light for the next of kin. He urged that in the previous cases the testatrix had been employed only in the work of testacy, and that the Court had refused to infer therefrom any intention applicable to the case of intestacy. Whereas, in this case, the work upon which the testatrix was employed was intestacy; and it is not to be denied that the testatrix, intending only to effect a limited object, may have given directions more extensive than that limited purpose required. But in answer to this it must be remembered, that what I am called upon to do is not to give effect to an intention expressed in the will, but to imply an intention, not expressed, in favor of parties to whom the testatrix's testamentary dispositions are as hostile as the clause of exclusion is to the heir,—parties whom she has excluded as directly as she has excluded the heir. How can I in such circumstances imply an intention in favor of those parties?—much less say that such intention is a necessary implication. Admitting the intention to exclude the heir, is not the intention to exclude the next of kin equally clear? Where, then, is there room for a necessary or any implication in favor of the next of kin?

[*154] *In these circumstances I feel myself called upon to follow the course of decisions, in holding that the testatrix has expressed an intention to exclude the heir only for the purposes of her will, and that if her words express more, and she has failed to say who shall take the surplus, the law must dispose of it. In this view I give full effect, not only to the words “in any event,” but to every word in the will, in their application to cases to which I think the testatrix meant to apply them; and I do not apply the words to any case to which they were not intended to apply.

It may perhaps be said, that my decision is in effect, that the next of kin can never take by implication. I do not say so. I say only, that where the testatrix has shown her intention not

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to die intestate, and has therefore shown an intention hostile to the next of kin, and where the words of exclusion of the heir have a sensible operation without applying them to a general intestacy, there is no necessary implication in favor of the next of kin. I rely more than all upon what I should call the common sense of the case. I cannot imply an intention in favor of those whom the will excludes. The heir takes, not by intention, but in the absence of intention.

*SOBER *v.* KEMP.

[*155]

1847: 13th and 14th March.

A. mortgaged three houses (23, 26, and 27) to B., and afterwards contracted to sell 23 (one of the houses) to C.; C. paid the purchase-money to A. under the contract, but without obtaining a conveyance, and with constructive notice of the prior mortgage to B. C. afterwards paid off what was due to B. upon his mortgage, and having taken a transfer of the mortgage, filed a bill against the devisee of A. and several mortgagees, under subsequent mortgages made by A., which included the houses 26 and 27, and other property, and obtained a decree for the specific performance by the devisees of A. of the contract of sale as to the house 23, and for the successive foreclosure of all the subsequent mortgagees, and the devisee of A., in default of their redemption of the houses 26 and 17.

Decree for specific performance of an agreement for the purchase of part of the estate comprised in a mortgage which had been assigned to the plaintiff; and for redemption of the remainder of the estate by the defendants, according to their priorities, or for successive foreclosures; and in case of redemption by the prior mortgagees in their order, then for redemption by the subsequent mortgagees successively, or for their successive foreclosure.—See Seton on Decrees, "Mortgages," No. IX., p. 157.

ON the 24th of May, 1828, the plaintiff entered into a contract with Mr. Kemp to purchase from him the house and premises, No. 23, Sussex-square, Kemp-town, at the price of 2900*l.*, then paid, and of 250*l.* to be paid when the conveyance should be executed, making together 3150*l.*; and Mr. Kemp thereby agreed to re-purchase the premises, at the same price, at the expiration of five years, if the plaintiff should be desirous of re-selling the

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same. The 250*l.* was afterwards paid, but the conveyance was not executed. The plaintiff was in possession of the house at the time the contract was made, and thenceforward continued in such possession. The same solicitor acted for both parties in this transaction, and by that means the plaintiff had constructive notice of a mortgage, for a long term of years, of the house No. 23, Sussex-square, and two houses (26 and 27,) Lewis-crescent, Kemp-town, to John Sivewright and Francis Sivewright, by indentures dated in July, 1824, and January, 1827. The plaintiff first had actual notice of this mortgage in April, 1842.

In December, 1844, Mr. Kemp died, having by his will devised his real estate (with some exceptions, which did not include the houses comprised in Sivewright's mortgage) to Frances Margaretta Kemp, his widow.

In 1845, the plaintiff agreed to pay off Sivewright, and take a transfer of his mortgage, and accordingly, by an indenture dated the 1st of April, 1845, in consideration of 355*l.* 14*s.* 3*d.*, and 12*l.* 3*s.* paid by the plaintiff to the representatives [*156] of Sivewright as therein *mentioned, the house and premises in Sussex-square, and the other premises in Lewis-crescent, and the moneys due upon the mortgage, were assigned and transferred to the plaintiff.

The bill, which was filed in August, 1845, stated that the defendants, Messrs. Baring, claimed under a mortgage made in October, 1840, to secure advances made by them to Mr. Kemp, amongst other hereditaments, three houses (26, 27, and 28) in Lewis-crescent, two of which (26 and 27) were comprised in Sivewright's mortgage. The bill also stated that the defendants Messrs. Lawford claimed an interest in, amongst other premises, the three houses in Lewis-crescent, under a security, created in 1847, for moneys owing to them from Mr. Kemp.

The bill prayed that the defendant Frances Margaretta Kemp might be decreed to execute to the plaintiff, or as she should direct, a good and valid conveyance, free from incumbrance, of the messuage and premises No. 23, Sussex-square, according to the terms and conditions of the agreement of May, 1828, the plaintiff offering in all respects to perform the said agreement

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on her part; and that, if it should be necessary, the defendants Messrs. Baring and Messrs. Lawford might be decreed to join in such conveyance; and the bill also prayed that an account might be taken of what was due to the plaintiff for principal and interest secured on the premises comprised in Sivewright's mortgage; and that the defendant Frances Margareta Kemp might be decreed to pay to the plaintiff what should appear to be due and owing to her on taking the account, together with the costs of the suit, by a short day &c., the plaintiff offering thereupon to re-assign such of the mortgaged premises as were comprised on Sivewright's *mortgage (except 23, Sussex- [*157] square) unto the defendant Frances Margareta Kemp, or as she should direct, free from incumbrances. And in default of such payment, that the other defendants, successively, according to their respective priorities, might redeem the plaintiff, or that they might be successively foreclosed.

The facts were not questioned. At the hearing,

Mr. *Rolt* and Mr. *Malins*, for the plaintiff.

Mr. *Romilly* and Mr. *Lloyd*, for Messrs. Baring and Messrs. Lawford:—

The plaintiff has a mortgage which comprises two properties, A. and B.; and the defendants have a mortgage comprising one property, B. only. The bill asks that the plaintiff, if she be not redeemed, may hold both properties, A. and B., foreclosed; but that, if she be redeemed, she may only convey property B.—to the parties by whom the redemption is made. In this respect the suit is novel. Suppose the Messrs. Baring had got in the legal estate by paying off Sivewright's mortgage, could they then have insisted upon the corresponding right as against the plaintiff, of requiring her to redeem the whole of the mortgage debt on the entire property, or be foreclosed as to No. 23? Again, suppose the bill had been brought by Sivewright, whose mortgage comprised both properties,—could he have required the defendants to redeem him, without conveying to them all the pro-

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party comprised in his security ; and if not, how can the plaintiff, who has taken, and proceeds in this suit (so far as it is a bill for foreclosure) upon Sivewright's security, have any better right against the defendants than Siverwright would have had ? It is

not alleged that the defendants Messrs. Baring or Messrs. [*158] Lawford were affected with notice of the plaintiffs *claim, at the time they took their security. The plaintiff purchased with constructive notice of Sivewright's mortgage, and therefore she was, in fact, bound to apply the purchase-money in paying off the mortgage, and if that had been done the defendants would, *pro tanto*, have been relieved from the prior charge. Where one party can resort to two funds or estates, and another to one only, the principle of equity is to marshal the debt ; or, at least, to apportion it rateably upon the estates subject to it : *Barnes v. Racster*, (a) *Bugden v. Bignold*, (b) 2 Story, Eq. Jur. p. 599. This is an attempt to combine a suit for specific performance with a suit for foreclosure, to which wholly different principles are applicable. The right of the defendants Messrs. Baring and Messrs. Lawford in this suit must be the same as they would have been, if the same defendants had been plaintiffs in a suit to redeem Sivewright.

Mr. J. H. Taylor, for the defendant Mrs. Kemp.

VICE-CHANCELLOR :—This is a bill for the specific performance of a contract of purchase, against the representative and devisees of the vendor, and also against mortgagees who are not parties to the contract. The fact, that the premises, which are the subject of the contract, are subject to incumbrances, raises a question of conveyance, but not of title. If the effect of a suit for foreclosure were to compel the mortgagor or the subsequent mortgagees to redeem the plaintiff, it is clear that it would be most unjust to compel them to pay the whole amount [*159] of the money secured upon *the premises which are subject to the mortgage now vested in the plaintiff, and

(a) 1 Y. & Col. C. C. 401.

(b) 2 Y. & Col. C. C. 377.

to take a conveyance of part only of the property comprised in that security. But the subsequent mortgagees cannot be injured by having the option given them either to redeem the plaintiff's mortgage upon the property comprised in her security, and take a conveyance of the premises which are subject to the security of the subsequent mortgagees, or to be foreclosed as to the latter, and retain their security over the other property comprised in their mortgages, discharged from the prior mortgage of the plaintiff. The only question is, whether Mrs. Sober is in a condition to compel the defendants to exercise this option.

The plaintiff agreed with Mr. Kemp to purchase a house, No. 23, Sussex-square, which, with two other houses, was in mortgage to Sivewright. The plaintiff had not actual notice of the mortgage, but that makes no difference in a case in which, according to the rule of the Court, she was affected with constructive notice, and, therefore, took the estate subject to the prior mortgage. The contract gave the plaintiff nothing but an equitable title; but by paying off the whole of the mortgage-money due to Sivewright, and taking a transfer of that mortgage, the plaintiff acquired the legal estate in the term of years. In this situation the plaintiff brings her bill against the representative and devisee of Mr. Kemp, praying the performance of the contract of sale, and an account of the money due upon the mortgage, and that the representative and devisee may be ordered to pay what should be due to the plaintiff, or be foreclosed; or that the subsequent mortgagees, in their order, may pay the amount due on the mortgage, or be foreclosed as to the same property. Suppose the bill had been brought by Mr. Kemp the mortgagor, to redeem,—could he have been heard to say *that he would redeem otherwise than subject to the [*160] contract as to No. 23? and, if the mortgagor had redeemed, the plaintiff might thereupon have brought her bill for specific performance of the contract, and would have been entitled to that relief as to No. 23, on the same terms as it is sought in this suit. Can there be any difference in respect to this equity of the plaintiff as against Mr. Kemp, and as against those who claim

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under Mr. Kemp, subject to the contract? The plaintiff paid her purchase-money to Mr. Kemp, and took the estate subject to a prior legal charge; she has got in the prior legal estate, and she asks, by this suit, to avail herself of that legal estate for the purpose of protecting her interest in the property, to the extent of the moneys which she has actually paid, and no further.

It has always appeared to me, that the terms on which a mortgagor or those claiming under him are entitled to redeem must be the same, whether they are to be ascertained in a suit for redemption or for foreclosure.(a) It is truly said, that a plaintiff seeking equity must do equity; but in determining what is equity, the question is, what are the duties or the liabilities which his situation at the time of instituting the suit imposes, and not whether he is plaintiff or defendant on the record.(b)

THIS Court doth declare that the agreement entered into by Thomas Read Kemp, deceased, the testator in &c., bearing date the 24th day of May, 1828, [*161] ought to be specifically performed *and carried into execution, and the Court doth order and decree the same accordingly; and it is ordered that the said defendant Francis Margaretta Kemp, as devisee and legal personal representative of Thomas Read Kemp, the testator, convey the land, messuage, or tenements and hereditaments, No. 23, Sussex-square, Brighton, in &c., to the plaintiff, or as she shall direct such conveyance to be settled, &c.; and it is ordered that it be referred to the Master of &c., to take an account of what is due to the plaintiff for principal and interest on her mortgage in the pleadings mentioned; and it is ordered that it be referred to the Taxing Master of this Court in rotation to tax the plaintiff her costs of this suit. And upon the defendants Sir Thomas Baring, &c., their or either of their paying unto the plaintiff what shall be reported due to her for principal, interest, and costs as aforesaid, within six months after the said Master shall have made his report, at such time &c., it is ordered that the plaintiff do assign the premises comprised in her said mortgage (other than the land, messuage, or tenements and hereditaments, No. 23, Sussex-square) free and clear of and from all incumbrances done by her or by any claiming by, from, or under her, and deliver up all deeds, papers, and writings in her custody or power relating thereto upon oath, to the last named defendants, or to such of them as shall redeem the plaintiff, or to whom he or they shall appoint: but in default of such last named defendants, their or any of their paying unto the plaintiff what shall be reported due to her for principal, interest, and costs, as aforesaid, by the time aforesaid, the said last named defendants are from thenceforth to stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the said mort-

(a) See *Du Vigier v. Lee*, 2 Hare, 324.(b) *Hanson v. Keating*, 4 Hare, 5.

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gaged premises; and in case of such foreclosure, it is ordered that it be referred back to the said Master to compute the plaintiff her subsequent interest; and it is ordered that the said Taxing Master do tax the plaintiff her subsequent costs; and it is ordered that the said Master do certify what shall be due for such principal, interest, and costs. And upon the defendants Edward Lawford and John Lawford, or either of them, paying unto the plaintiff what shall be reported due to her for principal, interest, and costs as aforesaid, within three months after the said Master shall have made his subsequent report, at such time, &c., it is ordered that the plaintiff assign the said mortgaged premises other than &c. [Same form as upon the redemption by or foreclosure of Messrs. Baring. In case of foreclosure,—same form for redemption by, or foreclosure of Francis Margareta Kemp.] But in case the said defendants Sir Thomas Baring, &c., shall redeem the plaintiff as aforesaid, it is ordered that it be referred to the said Master to take an account of what is due to the said defendants *for principal and interest on their mortgage in [*162] the &c., and also compute subsequent interest on what they shall so pay to the plaintiff as aforesaid; and it is ordered that the said Taxing Master do tax them their costs of this suit. And upon the defendants Edward Lawford and John Lawford, or either of them, paying unto the said defendants Sir Thomas Baring, &c., what shall be reported due to them for principal and interest on their said mortgage, and what they shall so pay to the plaintiff, together with subsequent interest thereon and their costs of this suit, the amount thereof, &c. within three months after the said Master shall have made his report, at such time, &c., it is ordered that the said defendants Sir Thomas Baring &c., do assign the premises comprised in their said mortgage and in the said mortgage to the said plaintiff, (other than the said land, messuage, or tenements and hereditaments, No. 23, Sussex-square,) free and clear of and from all incumbrances done by them, or any claiming by, from, or under them, and deliver up all deeds and writings in their custody or power relating thereto, upon oath, to the said defendants Edward Lawford and John Lawford, or to such as shall redeem the said defendants, or to whom he or they shall appoint; but in default of the said last named defendants, their or either of their redeeming the said defendants Sir Thomas Baring, &c., as aforesaid, by the time aforesaid, [foreclosure of Messrs. Lawford. In case of such foreclosure, same form for redemption by or foreclosure of Francis Margareta Kemp. In case of redemption of Messrs. Baring by Messrs. Lawford, same form for account of what shall be due to Messrs. Lawford, and for redemption of Messrs. Lawford by or foreclosure of Frances Margareta Kemp.] And for the better taking &c. Just allowances. Liberty to apply.

1847.—*Shailer v. Groves.*

SHAILER *v.* GROVES.

1847: 8th and 9th March; 29th April.

Bequest of sums of consols and 4l. per Cent. Annuities, to the testator's wife for her life, and at her decease one half of the produce of such sums to be received and divided amongst the testator's surviving brothers and sisters, and their issue, share and share alike :—*Held*, that the brothers and sisters living at the death of the testator took vested interests in the fund, liable to be divested by their death, leaving issue before the period of distribution; and that such issue took, by substitution, for their parents.

THE testator, by his will dated in 1798, gave to his wife Matilda Shailer the whole of his property and effects, except the principal sum of 1000l. Consols standing in his name, [*163] and the principal sum of 200l. 4l. per *cent. Bank Annuities likewise standing in his name; and his will was, that his wife should enjoy the interest arising on the said sum of 1000l. consols during her life, and the testator continued—"at her decease, it is my will that one half the produce of the said 1000l. and 200l. stock shall be received and divided amongst my surviving brothers and sister, and their issue, share and share alike;" and the testator directed that the remainder should be divided amongst the relations of his wife, unless she should think proper to order it otherwise by her will.

The testator left his widow surviving, and also left six brothers and one sister, all of whom died in the lifetime of the widow,—four of such brothers and sister leaving issue, and the others dying without issue. The question arose upon the death of the widow, between the personal representatives of the deceased brothers and sister of the testator, on the one hand, and the issue of the brothers and sister who left issue, on the other.

Mr. *Batten*, for the representatives of the deceased brothers and sister of the testator, argued that the person, to whom the term "surviving" referred, was the testator, and the time was the time of the testator's death.

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Mr. *Prior*, for the issue of the deceased brothers and sister of the testator, who survived the widow, argued that the word "surviving" referred to the death of the widow, and that the gift was only to such of the brothers and sister of the testator as should survive the tenant for life, and to the issue (whether children or more remote) of those who should die in her lifetime.

*Mr. *E. G. White*, for the trustees.

[*164]

The following cases were cited: *Lord Bindon v. Earl of Suffolk*,(a) *Stringer v. Phillips*,(b) *Haws v. Haws*,(c) *Stones v. Heurthy*,(d) *Roebuck v. Dean*,(e) *Perry v. Woods*,(f) *Maberly v. Strobe*,(g) *Daniell v. Daniell*,(h) *Jenour v. Jenour*,(i) *Hallifax v. Wilson*,(k) *Newton v. Ayscough*,(l) *Hoghton v. Whitgreave*,(m) *Cripps v. Wolcott*,(n) *Pope v. Whitcombe*,(o) *Girdlestone v. Doe*,(p) *Doe d. Long v. Prigg*,(b) *Gibbs v. Tail*,(r) *Blewitt v. Roberts*,(s) *Wordsworth v. Wood*,(t) *Salisbury v. Petty*,(u) *Taylor v. Beverley*,(w) and *Williams v. Tartt*,(x)

VICE-CHANCELLOR:—In deciding this case, I am glad to be able to say, as did the Lord Chancellor in *Wordsworth v. Wood*,(g) that it is not necessary to come to any conclusion, whether the decision of Sir J. Leach in *Cripps v. Wolcott*,(z) or the cases to which it is opposed, ought to be preferred, because I find circumstances in this case which enable me to decide it without entering into that question.

It is clear to my mind that, in this case, the testator

(a) 1 P. Wms. 96.

(d) 1 Ves. 165.

(g) Id. 450.

(h) 16 Ves. 171.

(i) 4 Madd. 11.

(j) 8 B. & C. 231.

(k) 4 Myl. & Cr. 641; 8 C., 2 Beav. 25.

(l) 1 Coll. 108.

(m) 4 Madd. 11.

(b) 1 Eq. Cas. Ab. 292

(e) 2 Ves. jun. 265.

(h) 6 Ves. 297.

(i) 19 Ves. 537.

(o) 3 Russ. 144.

(r) 8 Sim. 132.

(z) 2 Coll. 85.

(c) 3 Atk. 524.

(f) 3 Ves. 204.

(j) 10 Ves. 562.

(m) 1 J. & W. 148.

(p) 2 Sim. 225.

(s) 10 Sim. 491.

(u) 3 Hare. 86.

(y) 4 Myl. & Cr. 641.

 1847.—*Abram v. Ward.*

[*165] *must have intended a period of distribution later, in point of time, than the gift of the subject of distribution ; and that he intended to substitute for the primary objects of his gift the issue of such of them as should die between the time of the gift and the time of distribution. By this construction, effect is given to every word of the will according to its natural import, and I cannot make sense of the will according to any other construction of the words.

The fund must be divided in equal parts among the brothers and sisters surviving at the death of the testator. The children or issue of those who died in the lifetime of the tenant for life leaving issue, will take the shares of the parents, for whom they are substituted.

THE decree, as drawn up, seems not to be in conformity with this judgment.

ABRAM v. WARD.

1847 : 18th, 20th, and 22nd March.

Devise and bequest of residuary, real and personal estate to the testator's son and the heirs of his body for ever, and, in case the son should die without children, the whole to be divided amongst the testator's surviving grandchildren, share and share alike :—the son takes an estate tail in the freehold part of the property.

In a suit by some of the members of a class claiming to be entitled under a conditional limitation by devise in favor of such class, against parties who claimed under a recovery suffered of the estate by the first taker under the same devise, the other members of the class in the same interest as the plaintiffs, who decline to become co-plaintiffs, may be served with the copy of the bill, under the 29th Order of August, 1841 ; and, if they are required to appear and answer, their costs must be paid by the plaintiffs.

JOHN ABRAM the testator, by his will dated in August, 1809, after giving to his wife the sum of 10*l.* yearly, during the time that she should continue his widow, to be paid out of his freehold estate, or any other way that should be most convenient, and after giving certain legacies to his younger sons and daugh-

1847.—Abram v. Ward.

ters, gave all the rest, residue, and remainder of his freehold, leasehold, copyhold, and personal estate, goods and *chattels of what nature soever, to his son Hodgson [*166] Abram and to the heirs of his body lawfully begotten, for ever; but, in case his said son Hodgson Abram died without children, the said testator ordered and willed that the whole of the property, therein bequeathed to him, should be equally divided among his (the said testator's) surviving grandchildren, share and share alike.

The testator was, at the time of making his will and of his death, seised in fee simple of certain lands at Staintondale, in Yorkshire, subject to a mortgage. He died in January, 1817, leaving his said son Hodgson Abram surviving, who thereupon entered into the possession or into the receipt of the rents and profits of the hereditaments devised to him by the will. By an indenture of October, 1817, executed to lead the uses of a recovery of the devised premises, which was duly suffered by Hodgson Abram, in Michaelmas Term, 58 Geo. 3, the uses were declared to vest the same premises in Hodgson Abram, his heirs and assigns, for ever. The bill was filed after the death of Hodgson Abram by some of the grandchildren of the testator against a mortgagee of the estate, under a mortgage created in the lifetime of the testator, and against a purchaser of the equity of redemption from Hodgson Abram, for an account, redemption and a conveyance of the premises. At the hearing,

Mr. Romilly and Mr. Taylor, for the plaintiffs.

This is a case in which the testator by the use of the word "children," in the gift over, has affixed an interpretation to the preceding words "heirs of his body," which excludes the technical sense of those words: *North v. Martin*.(a) The latter words, expressing the event in *which the estate [*167] is to go over, determine the meaning of the words of the gift, as where children are construed to mean issue; *Minter v. Wraith*.(b) Here are the words "share and share alike," as

(a) 6 Sim. 266, 270.

(b) 13 Sim. 52.

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in *Gretton v. Howard*(a) and *Greenwood v. Rothwell*(b) which do not intimate any intention of perpetual succession. Adopting the principle of these cases, and construing the words "heirs of his body" to signify "children," Hodgson Abram will take an estate for life, with remainder to his children, remainder to his surviving grandchildren: *Goodtitle d. Sweet v. Herring*,(c) *Right d. Shortridge v. Creber*.(d) The Court, if it doubted upon the point, would direct a case for the opinion of a court of law: *Willcox v. Bellaers*.(e)

Mr. Cankrien, for the grandchildren of the testator who were defendants.

Mr. Kenyon Parker and Mr. Berry for the defendant Ward, the mortgagee, cited *Doe d. Strong v. Goff*,(f) *Driver d. Edgar v. Edgar*.(g)

Mr. Humphry and Mr. Elmsley, for the defendants John Ripley and his wife, the devisees of Mellam, the purchaser.—If it were conceded, that the words "heirs of the body" are to be construed "children," the estate of Hodgson Abram would be still an estate tail: *Doe d. Herbert v. Selby*.(h) But this is, in fact, *Wylde's case*,(i) and the rule there laid down by Lord Hardwicke, that, "if the preceding words are proper to create an estate tail, [*168] *the legal operation of them cannot be controlled by the subsequent provisions," is applicable to this will: *Thornhill v. Hall*.(k) *Harrison v. Foreman*.(l) The conditional limitation, in case Hodgson Abram should die without children, comes too late to avoid the effect of the recovery suffered by him, for the recovery was suffered before the determination of the contingency (if any there be) upon which the estate tail was to cease, and therefore while the devisee continued tenant in tail: Fearn

(a) 1 Meriv. 448.

(d) 5 B. & C. 866.

(g) Cowp. 379.

(k) 2 Cl. & Fin. 22, 36.

(b) 6 Beav. 492.

(e) 1 T. & R. 495.

(h) 2 B. & C. 926.

(l) 5 Ves. 207.

(c) 1 East, 264.

(f) 11 East, 668.

(i) *Wylde v. Lewis*, 1 Atk. 432.

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Conting. Rem. 427, *Doe d. Simpson v. Simpson*, (a) *Doe d. Jearrad v. Bannister*. (b)

VICE-CHANCELLOR.—The question is, whether Hodgson Abram at the time of suffering the recovery, was tenant in tail of the property in question, or whether he was tenant for life only. Of the effect of the devise to him and the heirs of his body, supposing there was nothing in the will to control these words, there is no doubt, and if under that devise he had an estate tail, the recovery would have converted that estate into a fee, so as to give title to the defendants who claim under Hodgson Abram in this cause. But it was argued that the words "heirs of the body" must, with reference to the subsequent words, be read as "children." If that were all which the argument for the plaintiff called upon the Court to do, the case would not be altered. The devise would stand thus: to Hodgson Abram and his children, forever, and if he die without children, over. The devise would still give an estate tail to Hodgson Abram, and this construction alone would not aid the plaintiff's case.

*It was further argued, however, that having arrived [*169] so far as to read "heirs of his body" as equivalent to "children," the Court must then modify the will, and reduce the estate of Hodgson Abram to an estate for life, with remainder to his children. Is there any ground for so reducing his estate? In all the cases cited in support of this argument, except the case of *Gretton v. Haward*, there was an express estate in the first taker for life, with remainder over; and the question was, whether the superadded words were words of limitation, vesting the inheritance in the tenant for life, or whether they were words of purchase. In all the cases, where there was an express estate for life, the Court held, that the superadded words were words of purchase. In *Gretton v. Haward*, no express estate for life was created, but the property was given generally, and after the death of the party, to go in a particular way, and in that case the Court held that the party took only for life. In my copy of Mr. Meri-

1847.—Abram v. Ward.

vale's reports, I find this note,—“Sir E. Sugden said *arguendo* that this case had been overruled, and Sir John Leach assented that it had.” In the present case, I search in vain for any ground for reducing the estate of the devisee to an estate for life. It was argued for the defendants, that even if the construction of the plaintiffs be adopted, so as to treat Hodgson Abram as having an estate for life, with remainder over, the remainder would be contingent upon the language of the will, as Hodgson Abram might or might not have had children, or if he had had children, they might all have died in his lifetime; the remainder in the grandchildren must therefore be contingent, and fail in the absence of any trustee to preserve such remainder, upon the life estate being destroyed. But I have no doubt upon the first ground that Hodgson Abram took an estate tail. I do [*170] not *think it necessary to send a case to a court of law upon the question.

Bill dismissed, with costs.

Mr. Romily submitted, that the defendants, the grandchildren of the testator, who were in the same interest as the plaintiffs, and who had been asked, and had refused to join as co-plaintiffs in the suit, but who had had, nevertheless, the benefit of the argument in their favor, ought to bear their own costs, and not receive costs from the plaintiffs.

Mr. Cankrien submitted, that the grandchildren, who were defendants, and had declined to be plaintiffs in the suit, ought not to have been served with a subpoena, but ought to have been served with a copy of the bill, under the General Order XXIX. of August, 1841.

The VICE-CHANCELLOR said, that it was a case clearly within the General Order, where “no account, payment, conveyance, or other relief,” was sought against these defendants, and in which the plaintiffs having required them to appear and answer the bill, must pay the costs thereby occasioned.

 1847.—*Eno v. Eno.*

**ENO v. ENO.*

[*171]

1847: 1st and 3rd May, and 10th June.

Real estate was devised in 1778 to the son-in-law of the testator for his life, remainder to his daughter (the wife of such son-in-law) for her life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, with cross remainders between them; and, in default of such issue of his daughters, to such person or persons as she should by deed or will appoint. In 1841, the daughter, the donee of the power, executed a deed-poll of appointment, which, reciting the limitations of the estate by the will,—that she had not any issue of her body, and that she was desirous of exercising the power subject to the life-interest of her husband and herself as thereafter mentioned,—appointed that, from and after the decease of the survivor of her husband and herself, “and there being a failure of issue of her,” the said donee of the power, the estate should go, remain, and be unto and to the use of the plaintiff, his heirs and assigns forever:—*Held*, that this was a good appointment of the estate under the power.

That the words “and there being a failure of issue of,” &c., must be read either parenthetically, or as applying to the time of the death of the survivor of the donee of the power and her husband.

That the construction that the donee might have intended to appoint, or to reserve a power to appoint, to the female descendants of sons, or to give such descendants the chance of taking by descent, would be merely conjectural; and, moreover, was excluded by the express language of the will creating the power, which made no provision for female descendants of male issue,—and rebutted by the great age of the donee, who was then without any issue.

That the title of the plaintiff under the appointment, was one which the Court, in a suit for specific performance, would compel the purchaser to take.

A gift to children in tail not comprehending all the issue, followed by a limitation over in terms—“on failure of issue,” will generally be read as meaning all such issue as are before mentioned, unless it appears from the context that other issue than these provided for, were intended to take.

If the question had arisen entirely under the will of the daughter, and the words “there being a failure of issue of” &c., had been found in that will, following limitations to her issue like those contained in the will of 1778, in this case, those words would have been construed to refer to a failure, not of issue generally, but of such issue as the will had previously provided for.

For the purpose of determining the meaning of such a limitation, the principle of construction must be the same, whether the instrument be a deed or a will.

THIS was a bill by the vendor for the specific performance of a contract for the sale of real estate. The title was objected to

 1847.—*Eno v. Eno.*

by the defendant. The question which was the subject of the judgment in the cause, was, whether an appointment of the estate made by Mary Read, by deed poll, dated in April, 1841, in favor of the plaintiff, his heirs and assigns, to take effect after the decease of Mary Read, the appointor, and her husband, and the failure of issue of the appointor, was too remote, or invalid as introducing the female descendants of the male issue [*172] of Mary Read, who were not *objects of the power of appointment of which Mary Read was the donee; or whether, having regard to the previous recitals in the deed poll, which referred to the want of issue of Mary Read at the date of the deed, the appointment was not valid, as importing, not a general failure, but a failure of issue living at the death of the appointor and her husband. If the title of the plaintiff should not be established by virtue of the appointment, another question was, whether the plaintiff was not entitled to the estate under a will made by Mary Read, prior in date to the deed poll. The latter question it did not become necessary to decide.

The words of appointment by the deed poll, and the state of the title so far as it was affected by that instrument, are stated in the judgment.

Mr. *Romily* and Mr. *Metcalf*, for the plaintiff, contended that the language of the deed poll of 1841, appointing the estate from and after the decease of the survivor, "there being a failure of issue of the said Mary Read," must be read as descriptive of the fact which had been before recited, that Mary Read, who was then of very advanced years, had no issue; or if not treated as words of description, that the issue referred to must either be deemed to be "*such*" issue as had been before mentioned in the instrument, namely issue of the body of Mary Read, or to be construed with reference to the previous recitals, as issue living at the death of Mary Read: *Morse v. Lord Ormonde*,^(a) [*173] *Egerton v. Jones*,^(b) *Ellicombe v. Gompertz*.^(c) It was *true that the construction was in this case sought to be ap-

(a) 1 Russ. 382; S. C., 5 Madd. 99.

(b) 3 Sim. 409.

(c) 3 Myl. & Cr. 127.

 1847.—*Eno v. Eno.*

plied to a deed, and not to a will; but the construction was equally applicable to one instrument as to the other: *Wright d. Burrill v. Kemp*(a) *Doe d. King v. Frost*.(b) If the construction contended for, of the deed poll, were not adopted, then they contended that there had been no revocation of the prior will.

Mr. *Wood* and Mr. *Smith*, for the defendant argued that the strict words of the appointment, limiting the estate from and after the decease of the survivor of John and Mary Read, and there being a failure of issue of Mary, clearly made the limitation to the plaintiff dependant upon the indefinite failure of issue of Mary. That being found in a deed the language must be taken according to its strict import, and could not be modified or restricted to one particular class of issues, excluding others; and that the appointment was, therefore, void for remoteness: *Lady Lanesborough v. Fox*.(c) *Bankes v. Holme*.(d) *Bristow v. Boothby*.(e) The attempt to modify such expressions is very dangerous, for the Court may very probably depart from the intentions of their author. The donee of the power in this case might have intended to give interests in the estate to the female descendants of sons; or, if there should be any such female descendants of sons, to allow the estate to descend, and thereby afford them the possibility of inheriting. It is, therefore, very probable that the restriction of the language of the appointment which the argument for the plaintiff suggests, even if the Court were at liberty to adopt it, would be contrary to the intention of the appointor. At least, in a case of so *much doubt, the purchaser [*174] will not be compelled to accept the title.

The arguments and cases cited on the question of revocation are omitted, as no judgment was given upon that point.

The VICE-CHANCELLOR:—The bill is by a vendor for the specific performance of an agreement for the sale of land. There

(a) 3 T. R. 470,

(b) 3 B. & A. 546.

(c) Ca. temp. Talb. 262.

(d) 1 Russ. 394, n.

(e) 2 Sm. & Stu. 465.

1847.—*Eno v. Eno.*

is no contest except upon the title. The objection to title is confined to a single point raised upon the pleadings; and I have been requested by both parties to decide the case without a reference to the Master. The case is as follows:—

Before and at the time of sealing and executing the deed poll of the 8th of April, 1841, the property comprised in the contract which it is the object of this suit to enforce, stood limited, under the will of James Mackerill, dated the 26th of August, 1778, (subject to charges not affecting the question in the cause,) to his son-in-law, John Read, for life, with remainder to trustees to preserve contingent remainders, remainder to his daughter, Mary Read, for life; remainder to trustees to preserve contingent remainders, remainder to the first and other sons of Mary successively in tail male, with remainder to the daughters of Mary, as tenants in common, and not as joint tenants in tail, with cross remainders between or amongst them; and for default of such issue of his daughter, the testator did thereby will and direct that it should be lawful for his daughter, whether covert or sole, by any deed or writing by her, sealed and delivered in the presence of three or more credible witnesses, or by her [*175] *last will and testament, to give and devise the same premises, and every part thereof subject as aforesaid, to such person and persons, or for such estate and estates, uses, trusts, intents, and purposes, and charged and chargeable with such sum or sums of money, either annual or in gross, as she, his said daughter, should think proper.

By deed poll, dated the 8th of April, 1841, and duly executed in conformity with the power of which Mary Read was donee under James Mackerill's will, she appointed the property in question to the plaintiff, John Eno, in fee.

Two questions are made—first, whether the appointment is good; and, secondly, if not, whether the plaintiff is not entitled under the will of Mary, of an earlier date. I will begin by considering the first question, on the deed poll.

The deed poll recites, and correctly recites, the estates created by the will of James Mackerill, and thereby avoids the difficulty which otherwise might have embarrassed the Court in this case,

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upon the authority of *Bankes v. Holme*,^(a) notwithstanding what Lord Eldon said of that case in *Morse v. Lord Ormonde*,^(b) and the decision of the Vice-Chancellor of England in *Egerton v. Jones*.^(c)

The deed then recites the death of James Mackerill, and proceeds in the following words:—

*“And whereas the said Mary Read has not any issue of her body; and whereas the said Mary Read did, many years *since, in pursuance of the said power to her given by [*176] the said hereinbefore in part recited will, appoint a small piece or parcel of land, part of the eight acres of land lying in the Fleet aforesaid, (and in the said will stated to be in the occupation of Widow Cliff,) to the purchaser thereof; and whereas the said Mary Read is desirous of exercising the power of appointment as to all and singular the said lands and hereditaments devised by the said hereinbefore in part recited will of the said James Mackerill, and which have not been already so appointed by her, the said Mary Read, as aforesaid, subject to the life interests of the said John Read and Mary his wife respectively in the said premises, in manner hereinafter mentioned. Now these presents witness, that, for effectuating such the desire of the said Mary Read, and pursuant to and by force and virtue, and in exercise and execution of the power or authority to her for this purpose given or limited by the hereinbefore in part recited will of the said James Mackerill, and of every or any other power or authority in anywise enabling her in this behalf, she, the said Mary Read, doth by this present deed or writing, by her sealed and delivered in the presence of the three credible persons whose names it is intended shall be hereupon indorsed as witnesses, attesting the sealing and delivery of these presents by her the said Mary Read, direct, limit, and appoint, that, from and after the decease of the survivor of the said John Read, and herself, the said Mary Read, and there being a failure of issue of the said*

(a) 1 Russ. 394, n.

(b) 1 Russ. 382.

(c) 3 Sim. 409.

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Mary Read, all and singular the said messuages, lands, tenements, and hereditaments, devised by the said hereinbefore in part recited will of the said James Mackerill, and which have not been so appointed by the said Mary Read, as hereinbefore is mentioned or recited; and all lands and hereditaments which have been heretofore set out, allotted and awarded by the com-
 [*177] missioners for the *inclosure of the commons in Long Sutton, in respect of rights of common appertaining or appurtenant to the said messuages, lands, tenements, and hereditaments, or any part thereof, with their and every of their rights, members, and appurtenances, shall, subject to the said annuity of 40s., charged by the said will upon part of the said hereditaments, as hereinbefore is mentioned and recited, go, remain, and be unto and to the use of John Eno, of Sutton St. Mary aforesaid, shipowner, his heirs and assigns, for ever." John Eno is the vendor, and the plaintiff in this cause.

Now, the objection taken to the title is, that the appointment to the plaintiff is after a general failure of issue of Mary, and is therefore void; the estates not being so limited by the will of James Mackerill as to give any interest to the female descendants of the male issue of the donee of the power.

In considering the validity of this objection, the question is, not whether there may not have been a time in the history of the law at which a title depending upon such a limitation would have been unmarketable, but whether the present state of the authorities is not such as to remove all objection to it. To try this, I will begin by supposing that the estates limited to the issue of Mary Read by the will of James Mackerill had been created by Mary Read herself, as the owner in fee,—that the limitation to the plaintiff had been in the same instrument as that in which the limitations are,—that that instrument had been a will and not a deed,—and that there had been no recitals or other circumstances to aid the construction of the appointment. Upon that hypothesis, without saying that the title would be such as the Court ought to compel a purchaser to take, I have a strong opinion that the appointment would be valid.

[*178] *The question is, whether the appointment is to be read

as appointing the estate to the plaintiff in default of all issue generally of Mary Read, including female descendants of male issue, (for whom, by the supposition, no provision is made,) or in default of "such issue" as she (upon the present hypothesis) has made provision for by the will. If the appointment were to be construed by any but a lawyer, it is scarcely possible to doubt the construction that would be put upon it. Nothing can be more irrational than a construction of the instrument which supposes the donee first to have created limitations to issue, and then capriciously to have postponed the estate of the appointee to a period not depending for its commencement upon the determination of the interests of those to whom the estate was previously given, but until the failure of issue of persons to whom, by the supposition, no estate or interest was given. The question, however, is, whether the inference arising from such a literal construction is sufficiently strong to justify the court in modifying the words of the appointment.

The case of *Morse v. Lord Ormonde*, on appeal, appears to me to be a direct authority in favor of the validity of the appointment in such a case. Lord Eldon's observations, particularly those in 1 Russell's Reports, p. 405, appear to me clearly to recognize the principle of construction for which the plaintiff has contended—that a gift to children in tail not taking in all the issue, followed by a limitation over in terms on failure of issue generally, must, *prima facie*, be read as meaning all such issue as before mentioned, unless it appears from the context that other issue than those provided for were intended to take. It is true that in that case Sir John Leach noticed, and appeared to rely in part upon the term of years, observing, "It is irrational to say that the testatrix did not intend that [*179] the purpose and the terms should meet." But Lord Eldon does not notice that in his judgment, and it is difficult to see the force of it, for whether the testatrix intended to give the legacies upon an indefinite failure of issue—the legacies secured by the term—or only upon failure of the issue before mentioned, the place of the term in the settlement would have been the

same, that is, next after the particular estates, and next before the limitation of the fee; and it cannot be denied that a term may be well created, the trusts of which are invalid. The case of *Ellicombe v. Gompertz*(a) appears to me to be a strong authority the same way; for however guarded the language of the Lord Chancellor may have been, I cannot read the passages of his judgment in p. 148, and again in p. 151, and the following pages of the Report, without being persuaded that, in a simple case like that which I am now supposing, he would decide, that, unless the context led to a different inference, the words describing the event upon which the gift over was to take effect, must, though general in terms, be construed with reference to the preceding gift; and the approbation with which Lord Cottenham, in that case, refers to Mr. Jarman's work, leads me to the same conclusion. The parts of Mr. Jarman's book to which I understand Lord Cottenham to refer, will be found in p. 361, as to personalty; and p. 372, as to real estate, in the edition of 1844. I do not refer to other cases, because the important ones will be found in *Ellicombe v. Gompertz*, with the addition of Lord Cottenham's observations upon them. I cannot but think that the authority of the case of *Bristow v. Boothby* is shaken, if not destroyed, by *Morse v. Lord Ormonde*, and *Ellicombe v. Gompertz*, unless it is to be upheld by the distinction that in that case the question *depended upon [*180] the construction of a deed and not of a will. It is, moreover, deserving of observation, that in *Morse v. Lord Ormonde* Sir John Leach treats as conjectual that which, in *Bristow v. Boothby*,(b) was the basis of his judgment.

But can any sound distinction be taken between a deed and a will for a purpose like the present,—that is, would the conclusion be different upon the same hypothesis, supposing this difference only, that the entire disposition was in a deed instead of a will? The observations of Lord Kenyon in *Wright v. Kemp*(c) are deserving of all possible attention. In that case, which depended upon the construction of a surrender of copyholds, Lord Kenyon,

(a) 3 Myl. & Cr. 127.

(b) 2 Sim. & St. 465.

(c) 3 Term Rep. 470.

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after saying that such a surrender was considered as a common-law conveyance, and was not entitled to the same favorable construction as a will, says, "In deeds certain legal phrases must be used in order to create certain estates, as the word 'heirs' to create a fee, and 'heirs of the body' to create an estate tail. But beyond that I would say, with Lord Hardwicke, that there is no magic in particular words, further than as they show the intention of the parties." And again, he says "Here, therefore, in order to give effect to the intention of the surrenderor, we must say, that when he used the word 'or' he meant 'and,' and there is no case in which any difference has been made as to this point between a will and a deed, when the court is considering how the intention of the parties can be effected." The case of *Smith v. Earl of Jersey*(a) expresses the same doctrine, and numerous other cases establish the same proposition.(b)

*It was said, indeed, that Mary Read might in this [*181] case have intended to reserve a power to appoint to female descendants of sons; or, in case there were such, to leave the property to descend. To this suggestion, the observations of Sir John Leach, in *Morse v. Lord Ormonde*, that it is conjectural only; and, more strongly, those of Lord Cottenham, in *Ellicombe v. Gompertz*, in answer to a like suggestion, apply; and when to that is added the fact that Mary Read is mentioned by name in James Mackerill's will, dated in August, 1778, as a married woman, it seems to me impossible to admit any such hypothesis. The appointment was sixty-three years after the donee was spoken of as a married woman, therefore future issue could not have been anticipated. If, therefore, the limitations were such as I have supposed, I cannot but think the appointment would have been valid; and that the whole disposition, whether the limitations were created by deed or by will, would be equally good.

But the case does not rest here. There are in this case circumstances to show, irresistibly to my mind, that I have put the right construction upon this will. It might, indeed, be argued

(a) 3 Bligh, 290.

(b) See the cases collected in part of note (p.) Wigram on Admissibility of Evidence, pp. 75, 76, 3d edition.

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in the simple case I first put, that in the case I have supposed a doubt might exist whether the omission of the female descendants of the male issue was not by mistake, and that in the case of a parent providing for his own issue, it would be better to adhere to the letter of the will, and give the female descendants of the male issue not provided for a chance through an intestacy, rather than that the property should go over to strangers. In this case there is no place for such a conjecture for in James Mackerill's will he creates the limitation, not extending to the daughters of the male issue, and gives the power to his [*182] daughter after failure of such issue, clearly showing *that he, at all events, meant to exclude the female descendants of the male issue; and Mary, the donee of the power, exercises the power so given to her without giving anything to the issue not provided for. I cannot, therefore, proceed upon any mistake as to the omission of female descendants of male issue.

Another circumstance is, that in the deed-poll of the 8th of April, 1841, after reciting that Mary Read has no issue of her body, and that she intends to exercise her power, "subject to the life interests, of the said John Read and Mary his wife, respectively, in the said premises, in manner hereinafter mentioned," that is, reciting that a woman, probably of eighty years of age, had no issue; and then she proceeds to appoint the estate, "from and after," &c., in the words I before read. The words, "and there being a failure of issue of the said Mary Read," must, in a case so circumstanced, be read with reference to the purpose she had before expressed; and the words must be read either parenthetically, or as applying to the time of the death of the survivor of herself and her husband, which latter is, in my opinion, the true construction of the will. In that conclusion I rely upon *Lytton v. Lytton*,^(a) *French v. Caddell*,^(b) *Wellington v. Wellington*,^(c) *Jones v. Morgan*,^(d) and *Sanford v. Irby*.^(e)

It is unnecessary to go into the consideration of the question as to the revocation.

(a) 4 Bro. C. C. 441. Per Lord Thurlow.

(c) 4 Bur. 2165; S. C., 1 Black. 645.

(e) 3 B. & A. 654.

(b) 3 Bro. P. C. 257. Tom. ed.

(d) 1 Bro. C. C. 206.

 1846.—Wood v. Rowcliffe.

*WOOD v. ROWCLIFFE.

[*183]

1846: 15th, 16th, and 23d December.

Under the statute "for improving the law of evidence," (6 and 7 Vict. c. 85,) one defendant in a suit in equity is a competent witness in the same cause on behalf of another defendant; and it is not a just exception to his evidence, that the title of the plaintiff to sustain the suit against both defendants depends upon the same issue; that fact can only be considered as affecting or tending to affect the credit of such defendant as a witness.

Assignment by the sheriff proved by the bill of sale of the under-sheriff, without proof of the authority by the sheriff to the under-sheriff.

The factors Act (5 & 6 Vict. c. 39) applies to mercantile transactions, and not to the case of advances made upon the security of furniture used in a furnished house,—not in the way of trade,—to the apparent owner of such furniture, such apparent owner afterwards appearing to be the agent intrusted with the custody of the furniture by the true owner.

Such "agent" is not an agent, nor is such furniture "goods and merchandize" within the meaning of the statute 5 & 6 Vict. c. 39.

WOOD, a judgment creditor of Knight, sued out execution against him, under which Knight's furniture, in his house in Nelson square, was taken by the sherriff, and assigned by bill of sale to Wood. Wood did not remove the furniture, but employed Elizabeth Wright who was a sister of Knight's wife, to keep possession of the goods as his agent; and they were removed by Elizabeth Wright to a house occupied by her in the same neighbourhood. Elizabeth Wright being in possession, and the apparent owner of the goods, in December, 1842, assigned them to Rowcliffe, as a security for a sum—£355, which she borrowed of him, and also for any further moneys which Rowcliffe might lend her. In 1843 Rowcliffe advanced to Elizabeth Wright a further sum of £110, which was, by indorsement on the assignment of December, 1842, made a further charge on the furniture. Rowcliff took also the promissory notes of Knight and Elizabeth Wright for the amount of the loans; and placed a man in possession of the furniture, but without removing it from the custody of Elizabeth Wright.

The defendant Buchanan had been the solicitor of Wood, and claimed a debt of 63*l.* 8*s.* 8*d.* as incurred in that capacity. Bu-

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chanan also had guaranteed to Rowcliff the repayment of the repayment of the futher charge of £110. taken from Elizabeth Wright a memorandum to the effect that certain title-deeds in possession of Buchanan were (subject to his existing lien) deposited to secure the 110*l*. The latter sum was afterwards paid by Buchanan to Rowcliffe. Rowcliffe being about to sell the goods, under the power in his assignment, the plaintiff instituted [*184] this suit, in which he obtained an injunction *to restrain the sale. The bill was afterwards demurred to, but the demurrer was overruled.^(a) The furniture was subsequently placed, for custody, in a warehouse in Gray's-inn-road. Buchanan was made a party to the bill by amendment, and claimed a lien on the title-deeds, and also the benefit of the further charge on the furniture. No claim was made by Elizabeth Wright.

16*th* Dec.—The cause now came on to be heard.

Mr. Romilly and Mr. Southgate, for the plaintiff.

Mr. K. Parker and Mr. H. Clark, for the defendant Rowcliffe.

Mr. Roll, for the defendant Buchanan.

The defendants disputed the title of the plaintiff to the furniture, and the alleged agency of Elizabeth Wright. They contended also that the transaction was a fraud upon Rowcliffe and Buchanan, to which the plaintiff was either a party, or which he had, by his conduct, enabled Knight and Elizabeth Wright to commit, by representing herself as the owner of the property, and in that character obtaining advances upon it.

In support of the case of the defendant Rowcliffe, the evidence of the defendant Buchanan was tendered, for the purpose of proving the title, or apparent title, of Elizabeth Wright to the furniture, and the title of the defendant Rowcliffe and delivery of pos-

(a) See 3 Hare, 305.

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session to him ; and also the conduct or collusion of the plaintiff and Elizabeth Wright.

*Mr *Romilly*, for the plaintiff, objected to the reading [*185] of the depositions of Mr. Buchanan.

Buchanan is a party to the suit, and therefore is not within the general words of the statute 6 & 7 Vict. c. 85. The question then, is, whether he is within the provision, "that in courts of equity any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff or of any defendant, in any such cause, saving just exceptions." The subsequent passage in the statute then provides that interest in *the matters in question* in the cause shall not be deemed a just exception, but shall only affect the credit of the witness. Taking these clauses together, three things appear : first, that parties to the cause generally are incompetent, as they were before the act : secondly, that defendants in equity are not to be excluded because they are parties, (nor were they before the act;) and, thirdly, that some cases might exist in which the evidence of defendants in equity would be inadmissible notwithstanding the act. In what cases, then, would the evidence of a defendant in equity now be inadmissible? The statute said that mere interest in the matters in question should not be deemed a just exception. But if the question between the plaintiff and the defendants be whether the suit can be sustained or not ; and if the evidence of one defendant be adduced in favor of another, to dismiss the suit on a ground which will entitle both the defendants to have the suit dismissed, that must be such a case as is contemplated by the statute as a just exception. That is the present case. The objection is not simply because Buchanan is interested in the question to be determined in this suit,—whether he is entitled to have the debt, alleged to be owing to him from Elizabeth Wright, *paid by means of the goods belonging to the [*186] plaintiff—greatly as that must affect his credit if any weight be given to interest ; but the objection is, that the suit is against Buchanan and Rowcliffe, and their cases are the same. If the bill be dismissed against Rowcliffe, it cannot be sustained

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against Buchanan; and he is called, therefore, in substance, to prove to the Court that he is not liable to this suit. It is not merely that he is interested in the property in question, but he is examined as a witness to procure the dismissal of a bill brought against himself. If the evidence of a party in such a situation be admissible, the depositions of a defendant in a cause in equity can never be excluded.

Mr. *Kenyon Parker* relied on the terms of the act, which had become law before this suit was instituted. Defendants in equity might be examined before the act, under the common form of order,—which suggested that the party to be examined had no interest in the question,—saving just exceptions. Interest was formerly a just exception. The act now provided that interest should no longer be a just exception. If, therefore, the act had any effect on the competency of defendants in equity, it must be to remove their incapacity under the previous law.

The objection was reserved.

Mr. *Bilton* appeared for Elizabeth Wright.

The VICE-CHANCELLOR,—on the first question, the equity of the plaintiff's case, supposing that case to be proved,—
 [*187] adhered to the judgment which he had pronounced *on the demurrer.(a) Upon the second question—the title of the plaintiff to the furniture in question—he held that the proof of the execution of the bill of sale by the under-sheriff, in the name of the sheriff, was sufficient proof of the assignment, *James v. Brown*,(b) without evidence of the authority under which the under-sheriff executed it. Thirdly; With regard to the identity of the property, he thought that the evidence went to prove that all the goods comprised in the bill of sale to the plaintiff were now in the warehouse in Grey's-inn-road, but not

(a) 3 Hare, 304. Affirmed by the Lord Chancellor. See 2 Phill. 382.

(b) 5 B. & A. 243.

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that all the goods in the warehouse had been comprised in the bill of sale.

The VICE-CHANCELLOR then proceeded :—

A fourth point is, the question of the agency of Elizabeth Wright. That the goods comprised in the bill of sale were in the possession of Elizabeth Wright at the time when the defendants, Rowcliffe and Buchanan, say their title accrued is a fact common to all parties. The plaintiff says, that she was in possession as his agent; and the defendants say that she was the owner, or was at least permitted to appear, and did appear to be the owner, and professed herself to be so: that they advanced her money upon that belief, and will be defrauded if the Court should take the property from them.

What, then, is the evidence upon this point? Knight who has been examined, says that Elizabeth Wright was in possession of the furniture as agent for the plaintiff. It is not suggested that she had any assignment from the *plaintiff giving [*188] her a title to the goods, or that she ever represented to Rowcliffe or Buchanan that her title was derived under any such assignment. The defendants, in fact, ignore the plaintiff's title altogether; and I have no doubt that the conduct of Elizabeth Wright in the transaction has been fraudulent. If I were compelled to come to a decision as to the question of the agency upon the evidence which I have already noticed, and if it were admitted that there was no other evidence upon which I could rely, I should conclude that this Court ought to exercise its equitable jurisdiction in the plaintiff's favor, provided the original title, which I think he clearly had in these goods, had not been interrupted by any dealings between himself and Elizabeth Wright, or by any act on his part, which act, by having enabled her to commit the fraud, would deprive him of the assistance of this Court. The question then is, whether the plaintiff's legal title, at the time the defendants say their interest was acquired, is so clear that I ought at once to act upon it. Unless that title be free from doubt, I ought not, at least without further inquiry,

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to give the plaintiff a decree. Upon the whole face of the transaction, admitting that he had a good title to the goods as against Knight, it is clear he has, actively or passively, allowed Elizabeth Wright, and the defendant Knight, to deal with the property as if it were their own, and to use it as a means of committing a fraud upon a third party.

Some evidence, however, has been tendered, to which I have now to advert. It is the evidence of the defendant Mr. Buchanan, and if that evidence be receivable, and I am to treat it as deserving of credit, there is evidence to show that the plaintiff at one time, towards the end of the year 1843, did not make the claim which he now makes, or that he acted in a manner inconsistent with that claim. That is the plain effect of the evidence of Buchanan. The question which was much argued at the bar therefore arises, whether Buchanan's evidence, he being a defendant, is receivable. A similar question has been before me in some former cases, but I have never hitherto had occasion to decide it. The stat. 6. & 7. Vict. c. 85, intituled "An Act for improving the law of Evidence," takes away the ground of incompetency, from the witness having an interest in the matter in question, or in the event of the trial or of the suit; and it declares that the interest of the witness shall go to his credit, and not to his competency. There is, then, a clause, which provides that the act is not to extend so far as to enable parties named in a cause to be examined; and it also provides (and that is the part to which I wish to refer) that certain persons who, though not the parties upon the record, are nevertheless the parties substantially interested in the cause, shall not be examined as witnesses. The act then enables any plaintiff in a court of equity to examine any defendant, and any defendant to examine a co-defendant, notwithstanding such defendant has an interest in the matter, or any of the matters in question in the cause. The objection taken was, that the latter clause cannot extend to enable one defendant to examine another defendant, where the defendant to be examined is, in effect, proving his own case. The terms of the act are, "that no person offered as a witness shall hereafter be excluded by reason of incapacity from

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crime or interest from giving evidence, either in person or by deposition, according to the practice of the Court on the trial of any issue joined, &c., provided that this act shall not render competent any party to any suit, &c., individually named in the record." Defendants in courts of equity are afterwards declared not therefore incompetent, and the interest *which [*190] they may have is not to be a just exception. If interest be not a just exception, then what is there to prevent any defendant from being examined, whatever his interest may be? and yet, if that construction be adopted, this consequence follows—that if two defendants claim a common interest in property against the plaintiff, each may examine the other as a witness to prove that which is their common case. At the same time, I confess I cannot myself read the act in any other way than as having brought the law into that state. The words are explicit and plain; and (subject to any question about credit) I have so much difficulty in getting over the act, that I will allow the evidence to be entered as read.(a) Further than that I do not go.

Then comes the question, whether I am to treat the evidence of Buchanan as entitled to credit. I receive it as evidence on behalf of Rowcliffe: but Buchanan is, in effect, proving his own case, and I have to consider how the evidence is to be dealt with in that point of view. I think that part of the case must fall within the observation which I am about to make, as to the very imperfect state of the evidence in the cause, and be governed by the conclusion I have come to, and which I shall presently state on that subject; observing, that there is no satisfactory evidence whatever to explain the position of Elizabeth Wright. I know only that she was left in the possession, use, and enjoyment of the property by the plaintiff, and that she asserted herself to be the real owner of it, creating charges upon it; and if any credit is due to the evidence of Buchanan, the plaintiff, at the end of 1843, was so far from denying that, that in fact he acted in a way which clearly *showed he did not [*191] claim the interest asserted by the bill.

(a) But see *Monday v. Guyer*, 1 De Gex & Smale, 182.

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Another point which was taken by Mr. Rolt, was, that, under the Factors' Acts (6 Geo. 4, c. 94, and the 5 & 6 Vict. c. 39) Elizabeth Wright was an agent in possession of and intrusted with the furniture in question, and was, therefore, able to make a good title to it by way of pledge or lien for the advances made to her. The words of the latter act are, "that, from and after the passing of this act, any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien, or security, bona fide, by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon and good against the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." Now, it may be true, that the words of the statute, in their general signification, are wide enough to comprehend the present case. But the act has never been understood to apply to other than mercantile transactions. The first act (6 Geo. 4, c. 94) is for the "protection of the property of merchants and others," and the property referred to is "goods, wares, and merchandize," intrusted to the agent "for the purpose of consignment or sale," or "shipped." And, upon a judicial construction of the act, it has been held that the generality of the [*192] expressions must be restricted. *Every servant of the owner of goods employed in the care or carriage of such goods is, in one sense, an "agent intrusted with goods," but still he is not an agent within the meaning of the statute. *Monk v. Whitenbury*.(a) The title of the second act (5 & 6 Vict. c. 39) is more general; but it appears to me to relate to "agents,"

(a) 2 B. & Adol. 484.

1847.—Steedman v. Poole.

and to "goods and merchandize," in a sense which it is not applicable to the agency or the property in this case.

Upon the unsatisfactory evidence now before me, I cannot give the plaintiff an immediate decree; and I must, therefore, either dismiss his bill, or retain the bill, giving him leave to take such proceedings as he may be advised, to establish his right at law against Rowcliffe and Buchanan in respect of the furniture. It appears to me, the latter is the course which I should take; for, if the case which the plaintiff makes, and which the defendants certainly do not disprove, be the true case, it would be unjust to throw upon the plaintiff the costs of this suit, when, in fact, he is prevented from obtaining a decree only by the nature of the case, which renders it scarcely possible that this Court can arrive at a conclusion upon it without the assistance of a court of law.

THE Decree retained the bill a year, with liberty to the plaintiff to bring an action or actions of trover against the defendants, who were to admit the possession and conversion of the furniture. Further directions and costs reserved. The form of the order was slightly altered upon a re-hearing before the Lord Chancellor, but the decision was substantially affirmed. See 2 Phill. 384.

*STEEDMAN v. POOLE.

[*193]

1847: 31st May.

Bequest of leaseholds to a married woman "for her whole and sole use during her life, free from the control of any future husband, and not to be sold or mortgaged, and, after her decease, to her heir or heirs, and provided her child or children should die before her, then that she may, at her decease, leave them to whom she will for the remainder of the term." The husband and wife demised the premises to a purchaser, and the purchaser demised them to another. The wife then filed her bill to have the under-lease set aside.

Held, that the gift was to the separate use of the wife, as well during the present as during a future coverture; that the under-lessees from the purchaser must be treated as having notice of the wife's interest; and that the under-lease to the purchaser should be set aside, but without costs.

Two leasehold houses, held for a long term, at a ground rent of 10*l.* per annum, were bequeathed to the plaintiff Mary Ann

1847.—*Steedman v. Poole*.

Steedman, the wife of Thomas Steedman, the daughter of the testator, "for her whole and sole use, during her natural life, free from the control of any future husband, and not to be sold or mortgaged, and, after her decease, to her heir or heirs; and if her child or children should die before her, then she may leave them, at her decease, to whom she will for the remainder of the term."

The plaintiff deposited the lease with the defendant Poole, by way of equitable mortgage, to secure the repayment of moneys advanced by him to Thomas Steedman; and afterwards, in March, 1840, the plaintiff and her husband made an under-lease of the premises to Poole, for a term of twenty-six years, which was expressed to be in consideration of the expense incurred, and to be incurred, by Poole in the repairs and improvement of the premises, and the ground rent and covenants in the original lease to be paid and performed by him, and of the sum of 323*l*. then paid by Poole to the plaintiff and her husband. Subsequently, Poole demised the premises to Edney, as a security for an annuity payable to him by Poole, and afterwards Poole demised the same premises to Dunbar, to secure a debt owing by Poole to him. Poole entered into possession of the premises soon after he first became the mortgagee, and continued in such possession until 1844, when the possession was taken by Edney.

The bill was brought, in 1845, by Mary Ann Steedman against Poole and his under-lessees, to have the under-
[*194] *lease made to Poole in March, 1840, set aside and cancelled. Poole became bankrupt during the progress of the cause.

Mr. Wood and Mr. Southgate, for the plaintiff, cited *Attorney General v. Backhouse*,^(a) and other cases on the point, that the defendant must be taken to have notice actually or constructively of the title of the plaintiff under her father's will. The property is inalienable during her coverture. *Baggett v. Meux*.^(b)

(a) 17 Ves. 283.

(b) 1 Coll. 138.

1847.—*Steedman v. Poole.*

Mr. *Romilly* and Mr. *Tremenheere*, for Edney, and Mr. *Fooks*, for Dunbar, submitted, first, that the defendant was an under-lessee not affected with notice of the will, or of the interest of the plaintiff under it; secondly, that, if he must be taken to have notice of the bequest, the terms of it did not exclude Steedman, the present husband, but would only operate in case of a future coverture. The plaintiff and her present husband were married before the will was made; and there was nothing to prevent him from disposing of the property as he had done. *Sir Edward Turner's case*, (a) *Tudor v. Samyne*, (b) *Donne v. Hart*, (c) Thirdly, that the under-lease was not a sale or mortgage, but a mode of enjoyment of the property, reserving rent. And, lastly, that the plaintiff, having stood by and permitted her husband to deal with purchasers of the property, concealing her interest in it, was precluded from relief in equity. *Watts v. Creswell*, (d) *Savage v. Foster*. (e)

The VICE-CHANCELLOR held, that the gift of the *property by the will was a gift to the separate use of [*195] the wife, with a restraint from alienation; and the defendants, Edney and Dunbar, having notice of the under-lease to Poole, to which the plaintiff was a party, must be treated as having notice of the plaintiff's interest; and that the lease must be delivered up, and the rent and profits received after the institution of the suit accounted for. No costs to the hearing. Further directions and subsequent costs reserved.

(a) 1 Vern. 7. See 4 Hare, 3, n. (b)

(b) 2 Vern. 270.

(c) 2 Russ. & Myl. 360.

(d) 2 Eq. Ca. Ab. 515. 9 Vin. Ab. 415, pl. 24, S. C.

(e) 9 Mod. 36.

1847.—Hughes v. Clerk.

HUGHES v. CLERK.

1847: 23rd Dec.

The costs of exceptions to the answer of a defendant to a bill of discovery, which the Master, under the 19th Order of December, 1833, has certified ought to be borne by the defendant, are not within the 28th Order of April, 1828, or the 124th Order of May 1845; but the Court will, upon application (*ex parte*,) order such costs to be taxed and deducted from the costs of the suit payable to the defendant.

EXCEPTIONS to a bill of discovery were allowed; and the Master, under the general Order XIX. of the 21st of December, 1833, certified that the costs of the exceptions should be borne by the defendant. A sufficient answer was afterwards filed, and the defendant obtained an order to tax his costs of the suit. The plaintiff carried in his bill of costs of the exceptions; but the Taxing Master did not consider that he had authority to tax such bill under the General Order CXXIV. of May, 1845, or any other of the General Orders of the Court. The plaintiff thereupon presented his petition for an order to tax the costs of the exceptions, and deduct them from the defendant's costs of the suit. The defendant was not served with the petition.

Mr. *Shebbeare*, for the petitioner, submitted, that, although (the suit being for discovery only, in which there was no decree,) the case was not, in terms, within the General Order XXVIII. of April, 1828, and the taxation of the general costs of the cause was not made under that Order, yet the provision contained in the *General Order XIX. of December, 1833, giving the Master jurisdiction as to the costs of references for insufficiency, was applicable as well to suits for discovery as to suits for relief, and the Court would make a special order for the taxation of the costs, which the Master had certified the defendant ought to pay, and would not allow that certificate to be ineffectual.

The VICE-CHANCELLOR made the order.

 1847.—Mortimer v. Ireland.

MORTIMER v. IRELAND.

1847: May 25th.

The survivor of two executors and trustees bequeathed the trust property to A., upon the trusts declared by the original testator, expressing by the same instrument his wish that A. would execute the trusts with fidelity. No direction was given by the will of the original testator as to the appointment of new trustees. On a bill by the cestuis que trust for that purpose, *held* that A., though legally in the possession of the trust property, was not a trustee properly constituted, and that the cestuis que trust were entitled to have new trustees appointed by the Court.

T. B. MORTIMER, the testator, by his will, dated in 1835, gave legacies of £2000, £2000, £1500, and £2000 to the several plaintiffs for their respective lives, and "in the event of either of them dying without child or children," the legacy of the deceased to be divided amongst the survivors; and the testator added, "I give to Mr. Griffiths, solicitor of Cheltenham, the sum of £300, and to Mr. Pruen, his partner, £100, and I constitute and appoint those two gentlemen my executors and trustees." The testator died on the 16th of July, 1836, and Mr. Griffiths, the executor named in his will, died on the 17th of the same month of July. Mr. Pruen the other executor, proved the will and administered the estate, appropriating certain funds and securities to satisfy the plaintiff's legacies. Mr. Pruen died in March, 1846, having by his will appointed the defendants, Henry Pruen and Richard Ireland, his executors; and having, by a codicil to his will, devised and *bequeathed to Richard Ireland all the [*197] real and personal estates which were then vested in him (the testator Pruen) as trustee or as surviving trustee for any person or persons whomsoever, to hold to him (Ireland,) his heirs, executors, &c. upon the trusts affecting the same; adding: "The long experience I have had of the punctuality of the said Richard Ireland in the management of my property and collection of my rents and those of my father before me, induce me to place this great trust in his hands, in the full hope and confidence that he will administer the important trusts committed to him, and ap-

1847.—*Mortimer v. Ireland.*

appropriate the large amount of money and property hereby intrusted to him, with strict fidelity, honor, and integrity, so that those good friends who have long placed their property in my hands, may have no more reason to complain of him than they had of me. * * My last request to you, Richard, is to perform this trust with honest punctuality and integrity. I know you will do so, and therefore it is that I select you, having no important business to attend to, in preference to my friend, George Edmund Williams, who I had once selected, but who, I think, is too overwhelmed in business to attend to it as I could wish." The defendant, Ireland, accepted the trust.

The bill was filed in September, 1846, for the appointment of new trustees of the legacies, and the transfer to them of the funds and securities upon which they were invested.

Mr. *Wood* and Mr. *C. R. M. Jackson*, for the plaintiffs, submitted that, although the trust funds and securities had, by operation of law, become vested in the defendant Ireland, [*198] and the trust property being the *property of the cestui que trust, Ireland was in that sense a trustee, yet he was not a trustee in whom T. B. Mortimer, the testator, had reposed any confidence, nor a trustee appointed under any competent authority, and that, therefore, the plaintiffs (in the absence of any express power to appoint new trustees) were entitled to have trustees appointed by the Court. Ireland was merely the party to whom both the law, and Mr. Pruen, the last survivor of the two trustees, had given the custody of the trust property until new trustees should be duly constituted: *Cooke v. Crawford*,^(a) *Cole v. Wade*.^(b) The will contained discretionary powers of investment which the original trustees had no authority to delegate.

Mr. *Romilly* and Mr. *Elderton* for the defendant, Ireland, and Mr. *Wickens*, for the defendant, Pruen, contended that Ireland was well appointed a trustee of the property; *Titley v. Wolsten-*

(a) 13 Sim. 91.

(b) 16 Ves. 27, 41.

 1847.—*Laycock v. Johnson.*

holme; (a) and having strictly performed his duty in that capacity, there was no ground for removing him from the office.

The VICE-CHANCELLOR said, that the plaintiffs were entitled to have new trustees appointed under the decree of the Court. That the property should be vested in a representative of the survivor of the trustees was a consequence which the testator must be supposed to have contemplated; but such a representative could not claim to hold it as the trustee of the parties beneficially interested against their will. It was not a case in which any special confidence had been delegated. He would refer it to the Master to appoint two *proper persons to be [*199] trustees of the trust moneys and premises, the defendant, Ireland, to be at liberty to propose himself as one of such trustees, but that to be without prejudice to any question in the cause.

Affirmed by the LORD CHANCELLOR, 28th July, 1847.

LAYCOCK v. JOHNSON.

1847: 24th and 25th May; 5th and 8th June.

R., the factor of W., of W. & K., of W. K. & P. of W. P. & C., and W. & B., accepted bills drawn on him by W. & P., they (W. & P.) agreeing that all the goods in R.'s hands, consigned to him by W. & P., either solely or jointly, should be security to R. for the amount of his acceptances. R. sold the goods in his own name. W. afterwards became bankrupt, and the assignees of W. gave notice to the buyers of the goods not to pay R. the moneys due in respect of such sale. All the debts owing for the goods were afterwards, by indenture, to which R. and the assignees of W. were parties, assigned to trustees, upon trust to apply the same as R. might legally do if the assignment had not been made. R. afterwards became bankrupt. The trustees having received the proceeds of the goods filed their bill against the assignees of W. and R., for the direction of the Court in the execution of the trust. By the decree, the Master was directed to state what bills of exchange had been accepted against the goods, and the amount and

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particulars of such acceptances, and the amount unpaid, and for that purpose he was at liberty to publish advertisements. Under such advertisements several claims were made before the Master, by K., and by other holders of the bills accepted by R. On further directions, *Held*,

That the bill holders had no interest in the proceeds of the goods, except that which might arise from the result of the contract between R. and W. & P.; that if there had been no bankruptcy, the bill holders could not have sustained a suit to have the proceeds of the goods applied for their benefit; that the happening of the bankruptcies did not affect the equitable rights of the parties; that the doctrine of the case of *Ex parte Waring* established a special mode for the payment of creditors applicable to the administration of the estate in the bankruptcy, but not to the administration of the trust in equity; that the advertisement made under the decree, and which had caused the bill holders to appear before the Master, gave them no right to appear,—and that they were not entitled to appear on further directions; and that (the general account as between the estates of W. and of R. being waived by the respective assignees) the assignees of R. were entitled to recover the trust fund, and to administer it in that bankruptcy.

T. RIDGWAY, in his business of wood-factor at Huddersfield, sold wools consigned to him by Henry and John Wilkins, and also by George Pressey, the agent of Messrs. Pollak, of Vienna.

Henry and John Wilkins and George Pressey (also as [*200] the agent of Messrs. Pollak,) *bought wools on their joint account, and consigned them to Ridgway for sale.

Henry and John Wilkins, Pressey, and a Mr. Cartwright, the manager of the North Wilts Banking Company, also bought wools on their own joint account, which latter wools were consigned to Ridgway by Henry and John Wilkins, on such joint account. Henry and John Wilkins, and a Mr. Briderman, of Vienna, also purchased wools on their joint account, which wools were consigned by Briderman to his agent, Renter who consigned them to Ridgway for sale on the joint account of himself and Henry and John Wilkins.

At the request of Henry and John Wilkins, and George Pressey, Ridgway, being in possession of the wools, or the proceeds of the wools, which were sold in his own name, accepted three bills of exchange drawn upon him by Henry and John Wilkins, and Pressey. One of these bills was paid at maturity, and the two others, for 2,862*l.* 2*s.* 4*d.* and 2,812*l.* 17*s.* 8*d.*, were deposited with the North Wilts Banking Company, and were

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afterwards renewed, such renewed bills becoming due on the 22nd of June, 1841.

In February, 1841, it was estimated that the balance of the proceeds or value of the wools in the hands of Ridgway, amounted to about 8000*l.* or 9000*l.*, and it was then agreed that George Pressey should draw, and Ridgway should accept, a bill for 9000*l.*; that Henry and John Wilkins should guarantee to the holder of the bill the appropriation by Ridgway of the stock and debts at Huddersfield, for the payment of the bill; and that the whole of the stock and debts existing both on the joint account of Henry and John Wilkins and George Pressey, and on the account of Henry and John Wilkins alone, should be security to Ridgway for the amount of *his acceptances. [*201] A bill for 9000*l.* was drawn and accepted accordingly, payable six months after date.

By a subsequent arrangement between the same three parties, a bill for 457*l.* 10*s.*, dated the 2nd of March, 1841, was drawn by Henry and John Wilkins, and accepted by Ridgway, and it was agreed that Henry and John Wilkins should provide for this bill at maturity, and if they should fail to do so, that it should go in part satisfaction by Ridgway of the 9000*l.* bill. The bill for 457*l.* 10*s.* was not paid.

In April, 1841, another bill, for 973*l.* 17*s.* was drawn by Henry and John Wilkins, and accepted by Ridgway. The Union Bank of London, upon the representation of Henry and John Wilkins, and Ridgway, that the wools, and the proceeds of the wools, payable to Ridgway, were sufficient to provide for the bill, made advances to Henry and John Wilkins upon it, and thereby became the holders of this bill.

In May, 1841, Henry and John Wilkins became bankrupt. All the above mentioned bills were then outstanding, and unpaid. The assignees of Henry and John Wilkins claimed to receive the moneys payable to Ridgway in respect of wools which he had sold on the account of the bankrupts; and gave notice to the purchasers not to pay to Ridgway the amount due in respect of such wools. Soon after this, Ridgway and the assignees of Henry and John Wilkins entered into an arrangement for the collection

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by trustees of the outstanding debts owing on account of the wools, and, in pursuance of that arrangement, an indenture, dated the 11th of June, 1841, was executed by Ridgway of the first part, the assignees of Henry and John Wilkins of the second part, and Laycock and another (the plaintiffs,) as [*202] *trustees, of the third part, whereby the debts specified in a schedule thereto were assigned to the plaintiffs, the trustees, upon trust that they should apply the money to be received from the debts, in the first place, towards paying the expense of the trust-deed and any other expenses incurred in the execution of the trust, and, in the next place, to apply the money in the same manner as Ridgway would be entitled by law to apply the same in case that assignment had not been executed.

Ridgway afterwards became bankrupt.

At this time, and subsequently in the course of the suit, four claims were made by the several bill holders upon the proceeds of the wools assigned to the trustee: 1. The North Wilts Banking Company claimed in respect of the two bills for 2,362*l.* 2*s.* 4*d.* and 2,812*l.* 17*s.* 3*d.*, after certain deductions, the sum of 4,532*l.* 9*s.* 4*d.*, and interest thereon. 2 Messrs. Pollak, who had ceased to employ Pressey as their agent, and had received from him the bill for 9000*l.* towards satisfaction of a balance of 12,000*l.* alleged to be due from him to them, claimed 6,279*l.* 16*s.* 1*d.*, as due to them from Ridgway, subject to the question whether that amount ought to be reduced, by reason of the two bills afterwards accepted by Ridgway, and dated, one in March, and the other in April, 1841. 3. The bill for 457*l.* 10*s.*, dated in March, 1841, which had come to the hands of R. Sanderson & Co. 4. The bankers of Henry and John Wilkins (the Union Bank of London) claimed, in respect of the bill for 973*l.* 17*s.*, the sum of 832*l.* 2*s.* 1*d.*, being the amount owing to them from the said bankrupts, after deducting the balance of their banking account.

All the bills had been drawn and accepted generally against the wools in the hands of Ridgway, on account [*203] *of Henry and John Wilkins and Pressey, whether on their joint or on their separate accounts. The 9000*l.* bill was indorsed generally by Pressey when he delivered it to

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Messrs. Pollak, but afterwards, when at maturity, it was indorsed to Messrs. Pollak, or order.

The plaintiffs, after having received moneys on account of the wool to the amount of 5,899*l.* 4*s.* 8*d.*, filed their bill against the assignees of Henry and John Wilkins, and the assignees of Ridgway, for the direction of the Court in the execution of the trust. The decree was taken by consent, under which the plaintiffs paid into Court the said principal sum and interest, and it was referred to the Master to take an account of the moneys come to their hands, and of the moneys outstanding in respect of the wools, and whether such outstanding debts were or were not recoverable; and the Master was also directed to inquire whether any and what bills of exchange were accepted by Ridgway, and at whose request, and for what account and for what purpose, and whether the same were drawn and accepted against the wools in the pleadings mentioned generally, or against any particular part or parts thereof, and if so, against which of such wools, and how much had been paid, and by whom, and out of what funds on account thereof, and what amount then remained unpaid, and when the same bills respectively were accepted, and what person or persons were or was then the holders or holder of such unpaid acceptances. And it was ordered that the Master should inquire whether any and what money was due to T. Ridgway at the time of his bankruptcy from the said Henry and John Wilkins, or their estate, in respect of his general account as the factor of Henry and John Wilkins. And for the purpose of making such inquiries, it was ordered that the Master should be at liberty, if he should think fit, to cause advertisements *to be published in &c., for the per- [*204] sons claiming to be holders of such bills of exchange as he should find to have been accepted by Ridgway as aforesaid, to come in and make out their claims before him, and he was to fix a peremptory day for that purpose.

Advertisements were issued in pursuance of the decree, under which the four descriptions of bill holders above specified came in before the Master and made their respective claims. The Master, by his report, after finding the amount of the moneys receiv-

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ed, and of the moneys outstanding and irrecoverable, and also the other facts of the case, to the effect above stated, found that the sum of 9,208*l.* 11*s.* 1*d.* was claimed by the assignees of Ridgway, as due to them from the estate of the said Henry and John Wilkins, but that such claim was disputed, and that a balance was claimed by the assignees of Henry and John Wilkins, as being in fact due to them from the estate of Ridgway; and the accounts between the parties extending over a long period of time, and being of a complicated character, it was submitted to the Master on the part of the assignees of Ridgway, that, inasmuch as such accounts for the most part did not affect the fund to be administered in this suit, it was unnecessary to incur the expense and delay of investigating them, and the several other parties interested having consented thereto, the Master had forbore to make the inquiry, by the decree directed, as to the amount (if any) due to Ridgway at the time of his bankruptcy from Henry and John Wilkins, or their estate, in respect of his general account in trust for Henry and John Wilkins. The report was confirmed.

At the hearing for further directions,

Mr. Romilly and *Mr. Goldsmid*, for the plaintiffs.

[*205] **Mr. Wood* and *Mr. Cole*, for the assignees of Ridgway, argued that the trust-fund could only be administered by the trustees, or by the Court in the place of the trustees, according to or in pursuance of the contract between the parties previous to the bankruptcy of either of them, and previous to the creation of the trust. The deed was not intended to do more than provide for the collection of the moneys outstanding, and thereby prevent the loss which might be occasioned by the conflicting claim of the assignees of Wilkins, and their notices to the buyers; but the fund once collected, it was clear upon the transaction that Ridgway was entitled to apply it in exoneration of his liability upon the bills. It was only upon the security of the wools that he had accepted the bills, and the proceeds of

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the wools must be applied in payment of such bills. They must have been so applied if Ridgway had continued solvent, and the assignees now stood in his place, and had the same rights.

Mr. *Walford*, for the assignees of Henry and John Wilkins. —In the transactions out of which the present question arises, the Wilkins' were the principals, and Ridgway was the agent. The property—that is, the wools—belonged to the Wilkins' and their co-adventurers. It cannot be pretended that Ridgway had any other right than the right of being paid or indemnified in respect of the liabilities which he incurred. Now the assignees of Wilkins aver that if the accounts between them and the estate of Ridgway were taken, Ridgway would be found the debtor. If the balance had been the other way, it might have been said, as a mortgagee or the claimant of an unsatisfied lien, Ridgway was entitled to receive the proceeds of the wools, and, after satisfying his own demand as factor, to pay the surplus over to his principal. But in order to establish this right, it was incumbent on the parties representing *Ridgway to show [*206] at least that something was due to him. This they have not thought proper to do. Upon their suggestion (to which, of course, the assignees of the Wilkins' did not object,) the general account between the two estates was waived. In such circumstances, no debt against the Wilkins' being established, the natural order of distribution must prevail; the proceeds of the wools must be paid over to the parties representing the owners of the wools. If, from any cause, the assignees of Ridgway should still think proper to claim a settlement of the account, and should establish a balance in their favor, they will not be precluded from their right of set-off in the bankruptcy. As the case at present stands, no such balance has been shown, and none ought to be assumed.

Both classes of defendants objected to the right of the bill holders, not parties to the cause, to be heard by their counsel on the further directions.

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Mr. *Swanston* and Mr. *Rolt* claimed to be heard on behalf of Messrs. Pollak, the indorsees and holders of the bill for £9000.

The Messrs. Pollak are the holders of the bill drawn by Pressey their agent and debtor, and accepted by Ridgway, on the security of the wools which had been consigned to him. They are entitled to receive the money produced by the wools, after satisfying the claims of the estate of Ridgway in respect of his actual payments. This right arises, as expressed by Lord Eldon in *Ex parte Waring*,^(a) not as having a demand upon these funds in respect of the acceptance they hold, but because the estate [*207] of Ridgway must be cleared of the demand *by his acceptance, and the surplus, after answering that demand, must be made good to the Wilkins'. It is a right which arises, indirectly, out of the equities of the respective bankrupts. A right arising from the equity of another party is frequently enforced in this Court. The separate creditor of one partner recovers his debts out of the partnership property by working out the equities of the partners, as between themselves, to have their respective rights or shares ascertained, and not by any demand which the separate creditor has upon the joint property. All the facts upon which the respective rights of the bankrupts and the bill holders arise, are now before the Court, and there is no difficulty in the way of disposing of the trust-funds according to the priorities of the claimants. They cited also *Ex parte Perfect*,^(b) and *Ex parte Hobhouse*.^(c)

On the question of form,—whether the bill holders, supposing them to be right in the equity which they claimed, could be heard on further directions without having presented any petition,—it was contended that a petition was unnecessary where the intervening party did not seek to vary or displace any part of the Master's report; *Young v. Everest*;^(d) that where his right resulted from the facts which the Master had found, the party, whether he was or was not a party to the cause, might appear and ask the Court for that decree, which was the necessary con-

(a) 19 Ves. 349.

(b) Mont. 25.

(c) 2 Deac. 291.

(d) 1 Russ. & Myl. 426.

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clusion upon the facts which were established by the report, without petition or exceptions.

Mr. *Anderson*, for the Union Bank of London, and for the North Wilts Banking Company, and Mr. *Follett*, for R. Sanderson & Co., all of whom were holders *of bills as [*208] above stated, supported in like manner their claim to intervene and have their respective priorities determined in the cause.

The VICE-CHANCELLOR:—after stating the facts of the case, the subject and frame of the suit, the decree, and the report of the Master:—

On behalf of the bill holders counsel have appeared upon the further directions, and claimed to be heard in support of the right which they assert to have the proceeds of the wool applied in payment of the bills in their hands. The right of the bill holders so to appear was controverted by the parties in the cause, as was also the interest they claimed in the proceeds of the wool. My opinion is, that the bill holders have not a right to be heard in this cause upon further directions.

The interests of the parties under the assignment of the 11th of June, 1841, cannot be affected by the form of this suit; those interests must be dealt with precisely in the same way as they would have been dealt with if one set of defendants had been plaintiffs, and the other set, with the trustees, had been defendants. Now, in the first place, suppose there had been no bankruptcy, and that Messrs. Wilkins had been plaintiffs, and Ridgway, with the trustees, had been defendants, seeking a determination as to their rights under the deed of assignment:—in that case no bill holder would have been a necessary or proper party to the suit. I mean to say that the effect of that deed, however it might give to Messrs. Wilkins or to Ridgway a right to say the proceeds should be applied for the benefit of the bill holders, was not to create an interest in the bill holders which they could enforce by suit. They *could not have inter- [*209] vened and filed a bill upon the footing of the deed to

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have the proceeds applied for their benefit. It was not argued at the bar that the bill holders could have so intervened. I notice this as a stepping-stone to the further observations which I have to make. It was admitted by counsel at the bar, that, except as a consequence of the bankruptcy, the bill holders could not appear. There appears to have been some communication made to the Union Bank of London respecting the application of the proceeds of the wool, but that communication was not relied upon at the bar, nor in the finding of the Master as affecting the result in this case.

Assuming that the bill holders could not have intervened if there had been no bankruptcy, the next point is, whether, taking the bankruptcy as a fact in the case, and supposing the assignees of Messrs Wilkins to have been plaintiffs, and the assignees of Ridgway, together with the trustees, defendants (omitting for the present the doctrine established by the case of *Ex parte Waring* and the other cases cited at the bar,) the case would be, in this respect, the same as the case which I first supposed. The assignees in each case standing in the place of the bankrupts, and representing all the creditors, the fund would be attributed by the Court to the estate entitled to it; and the fund having been given to the proper bankrupt's estate, would be distributed by the assignees in that bankruptcy.

The third question is, whether the doctrine established by *Ex parte Waring*, and the other cases, affects the alleged rights of these bill holders. That doctrine appears to me to make no difference for the purposes of the present suit. The creditors

must be paid in the bankruptcy; and the rule laid down [*210] in *Ex parte Waring* is *only a special mode of payment

● in the bankruptcy. In the case of *Thompson v. Derham*(a) I had occasion much to consider (and the Lord Chancellor afterwards approved of that decision) what the consequences would be if the Court should take upon itself to administer in equity the law which applies to the case of bankruptcy alone; and it appears to me now, as it did in that case, that any attempt to administer in

(a) 1 Hare, 358.

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equity the bankrupt's estate, would involve much substantial inconvenience to which parties ought not to be subjected. In truth, to apply the rule expressed in *Ex parte Waring*, is merely to adopt a special mode of paying the creditors whose case falls within that rule.

Now the fourth and last question on this part of the subject is,—Does the form of the decree in this case render it necessary that I should depart from the rule which otherwise I ought to follow? It appears to me that the only point which can arise upon the decree, is upon that part of it which directs the publication of advertisements. All the inquiries and direction in the decree, except those connected with the advertisements, would be strictly necessary for the purpose of adjusting the rights of the assignees as between each other. If the direction to advertise were not necessary for that purpose, it certainly is not so foreign to it as to justify the conclusion on my part that the direction was intended to confer upon the bill holders, who are not parties in the cause, an interest in the suit which they otherwise would not have had.

Excluding, then, the bill holders, the question is between the assignees of the two estates of the bankrupts; and if the transactions between Messrs. Wilkins and *Ridgway had [*211] been confined to the particular wool represented by the money in court, and the particular bills mentioned in the report, the decree would necessarily be to give the proceeds to the assignees of Ridgway to be by them administered in the bankruptcy. I say this because the amount to be paid on the bill exceeds the amount of the wool in their hands. But it was said by Mr. *Walford*, for the assignees of Wilkins, that there were other transactions between the bankrupts, and that until the state of the general account between the estate of Messrs. Wilkins and that of Ridgway at the date of the bankruptcies was ascertained, the proper decree to be made in this cause as between the estates of the two bankrupts would not be known. I have referred to the answers of the defendants for the purpose of seeing what cases they make in this respect. By the answers it appears that, on behalf of the estate of Ridgway, a balance is claimed to be due

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from the estate of the Wilkins', and, upon the general law of factors, a right is claimed to apply any proceeds in the hands of Ridgway for the payment of any balance that might be due from Messrs. Wilkins to him. No claim is made of any balance being due to them in the answers of the assignees of Messrs. Wilkins. The order made at the hearing of the cause was according to the rights claimed by the parties; and the decree directed an account to be taken of what was due to Ridgway from the Wilkins', but contained no counter-direction to take an account of what (if anything) was due to the Wilkins' from Ridgway. In the Master's office, however, it appears that a balance was claimed by both parties, but then both parties agreed that for the purpose of adjusting their rights in respect of the wools in question, it was not necessary to take an account of any transactions except those directly connected with the wools and the bills drawn [*212] against them, and accordingly the Master, by *consent of both parties, abstained from taking the general account as between the two estates. I am satisfied that no injustice is done by taking that course, and I shall act upon it by treating the state of the account as immaterial.

The only question that remains is, whether there may not be claims upon the wool or the proceeds of the wool by persons who are not parties to the record. It has not, however, been suggested to me as a fact that there are any such claims, and the trustees have not raised any difficulty on that ground, except that which arises from the claims of the bill holders, and which I have already disposed of, so far as relates to this cause.

It appears to me that the proper decree to be made, is a decree for payment to the assignees of Ridgway of the balance in court, subject, of course, to the question of costs, and without prejudice to the claim of any persons who are not parties to the record. The costs of the plaintiffs must come out of the fund. I wish to hear counsel upon the question of costs, as between the assignees of the two bankrupts' estates and the costs of the bill holders.

The several counsel for the bill holders and for the assignees

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of Messrs. Wilkins, claimed their costs, on the ground,—the former that they had been invited to appear by the advertisements, and the latter that they had been made parties for the purpose of properly administering the trusts under the direction of the Court, and that their presence was necessary for that purpose.

The VICE-CHANCELLOR said, that, as parties to the deed, the assignees of Messrs. Wilkins were necessary parties to *the suit, but having unsuccessfully made a claim to the [*213] proceeds of the wool, they were not entitled to their costs. He had already decided that the bill holders had no right to be heard or to have the fund paid over to them, and he could not give them their costs.

No order as to costs, except as to the costs
of the plaintiffs.

SOUTHCOMB *v.* THE BISHOP OF EXETER.

1847: 24th, 27th, 28th and 29th April; 21st June; 6th July; 5th August.

A contract for the sale of the vendor's interest in a manor under a lease for lives, was made on the 16th of October, 1840. Objections were taken to the title, and a correspondence between the solicitors of the vendors and purchaser took place, and continued until the 20th of August, 1841, when the purchaser gave notice to the vendors that, the title being defective, he rescinded the contract. The correspondence with reference to the title still proceeded (the purchaser's solicitor claiming his right to insist upon the notice, but giving the vendors two months more to complete the title) until the 17th of January, 1842, when the purchaser intimated that he should fall back to his position under the rescinded contract. The bill was filed on the 30th of August, 1843:—*Held*, that the interval between the 20th of August, 1841, and the 17th of January, 1842, ought not to be regarded in the question of laches, but that the delay, after the 17th of January, 1842, before the bill was filed, precluded the vendors from sustaining their suit for specific performance.[1]

The fact that the purchaser allowed the deposit to remain in the possession of the vendor from the time he (the purchaser) declared the contract to be rescinded

[1] See *Monro v. Taylor*, 8 Hare, 61.

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until shortly before the bill was filed, when he brought his action to recover it, did not affect the question of laches.

The possession of part of the property comprised in the contract, taken under a mutual arrangement, and in ignorance of the objection to the title which was afterwards discovered and relied on, did not affect the question of laches.

The tendency of the Court, in modern cases, has been to restrict the exercise of its jurisdiction in enforcing specific performance of contracts to those cases in which the plainaiff has been prompt in seeking his equitable remedy.

The purchaser being in possession of part of the property under the arrangement, and being advised to rescind the contract and assert his paramount title to the property, was not bound to give up the possession before he could assert such paramount title by making a formal entry on the property.

When the vendor's bill for specific performance is dismissed on the ground of his laches in instituting the suit, and without any decision on the question of title, the Court will not order the deposit to be returned to the purchaser, but will leave both parties to their legal remedies.

A BILL brought by the vendors for the specific performance of a contract for the purchase of their interest in a lease for three lives of the manor of Bishop's Nympton, in the county of [*212] Devon. The manor was *held of the See of Exeter, and the plaintiffs claimed to be the owners of the manor, under a lease granted by a former bishop, in March, 1823, upon the surrender of a then subsisting lease for lives granted in 1790. Prior to the contract which was the subject of the suit, a question had been raised as to the validity of the lease of March, 1823, on the ground of a doubt whether the lease of 1790 had been duly surrendered. The contract which the suit was brought to enforce was dated the 16th of October, 1840, and thereby the plaintiffs agreed to sell, and the defendant agreed to buy, all the estate and interest of the plaintiffs in the manor under the lease of March, 1823, (excepting some copyhold estates holden of the manor) at the price of 8000*l.*,—paying a deposit of 20 per cent. immediately, and the balance on the 29th of September, 1841, at which time the contract was to be completed, and the purchaser to have possession, and (if from any cause the completion of the purchase should be delayed) to pay interest at 5 per cent. The vendors were forthwith to prepare and deliver to the purchaser an abstract, and the same to be returned to the vendors within twenty-one days after delivery, with

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the opinion of the purchaser's counsel or solicitor thereon; and the agreement provided that the vendors should deduce a good title to the premises, save that the bishop, the purchaser, should not (if the purchase should be completed in his lifetime) object to the validity of the lease of March, 1823, on the ground of any defect or omission in the surrender of any former lease; but if the purchase should not be completed in his lifetime, the representatives of the bishop to be entitled to require proof of the validity of the lease of March, 1823; and in that case the vendors to be at liberty to rescind the contract, returning the deposit without interest or expenses.

*The deposit of 1600*l.* was paid upon the execution of [*215] the contract. The abstract was delivered on the 30th of October, 1840, and the bishop's solicitor, on the 4th of November, asked for an earlier title to the lease than the abstract showed. Some intermediate correspondence passed, and on the 2nd of December the vendors' solicitor delivered a further abstract. Observations on the abstract were answered by the latter solicitors on the 30th of December, and the correspondence continued until the 27th of February, 1841, when the solicitor of the purchaser first noticed the objection that the conveyance of five-eighths of the interest in the lease of March, 1823, to Lewis Southcomb, one of the plaintiffs, purported to be effected by the exercise of a power of appointment given to a married woman, since deceased, but which power did not appear to be well executed. The solicitors on both sides were under the impression that the difficulty with respect to the execution of the power might be removed by a second attestation, but on the 7th of May, 1841, the purchaser's solicitor informed the vendor's solicitor that he had been advised the defect could not be so cured; and on the 29th of May he explicitly objected to the title on that ground,—insisted on the conditions of the contract, and offered to deal with the possession and management of a part of the manor, called Crosse Farm—which had been taken by the purchaser by arrangement and in ignorance of the objection—in any manner which might be proper, until it could be ascertained whether the vendors could or could not perfect the title.

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On the 21st of July, 1841, the vendors' solicitor sent a further abstract, according to which he said it would be found that the donee of the power took, by an independent title, the estate which she purported to convey the appointment, and that her conveyance was therefore valid, whether it was or was not a [*216] good execution *of the power. On the 20th of August, 1841, the vendors' solicitor was informed by the purchaser's solicitor that he had attended a consultation of Mr. Duval and Mr. Prior, before whom the whole of the papers had been laid, and he had their joint opinion that, for the reasons already stated, the title was defective;—that the bishop was in consequence advised to rescind the contract, and demand the repayment of the deposit with interest and costs; and he requested that his then letter might be considered an intimation to that effect.

The correspondence was not definitively concluded by the letter of the 20th of August. In reply to a letter requesting to know when the deposit would be repaid, the vendors' solicitor, on the 1st of September, wrote that they considered they had shown such a title as the purchaser was bound to accept,—that they could not permit the contract to be rescinded,—and that the papers would be laid before counsel, by whom their future proceedings would be regulated. The bishop was then advised to treat the lease of March, 1823, as void, and the manor as having reverted to the see; and he accordingly made an actual entry, and executed a lease of the manor to Mr. Saunders. This step was communicated to the vendor's solicitor by a letter of the 14th of September. The correspondence afterwards continued between the two solicitors,—the purchaser asserting, however, his right to insist on the notice of the 20th of August. To an offer made in November, to procure the heir of the donee of the power to join in the conveyance, the solicitor of the purchaser, on the 16th of November, 1841, replied that it came too late, but he would consent to entertain the question without prejudice to the notice, concluding, "In order to prevent any further [*217] delay in this protracted business, I *must request that the information and evidence be furnished within two months, and if not perfected within that time, the parties will

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fall back to their original position under the rescinded contract." This was followed by a correspondence as to the heirship, which was not satisfactorily made out; and on the 17th of January, 1842, the purchaser's solicitor, wrote to the vendors' solicitor that the two months having expired without the requisitions having been complied with, the bishop would fall back to his position under the rescinded contract, and referring to the letter of the 20th of August, he demanded re-payment of the deposit, with interest and costs. To subsequent communications the purchaser's solicitor declined to attend, informing the vendors' solicitor that he did so because the contract had been rescinded.

The bishop, in a letter to the vendors' solicitor on the 28th of February, 1842, adverting to some public remarks that had been made, said, "Whenever the proper time shall come I will act according to my own sense of what is liberal and becoming; meanwhile you must not suppose that I wish you in any degree to relax in your endeavors to compel me to complete the contract I have been advised to rescind; no such endeavor, conducted in the ordinary manner, will indispose me to your clients."

The bill was filed on the 30th of August, 1843.

Mr. *James Parker* and Mr. *Rogers*, for the plaintiffs, and Mr. *Romilly*, Mr. *Roll*, and Mr. *Prior* for the defendant.

The greater part of the argument was directed to the question of title, upon which the Court pronounced no *opinion. The points on the question of laches, and [*218] cases cited, will sufficiently appear in the judgment.

The VICE-CHANCELLOR stated the facts out of which the suit had arisen, and the correspondence which took place after the abstract was delivered, and after the objections to the title were made, and said that he would, first, exclude the circumstance which had taken place since the agreement in relation to Crosse Farm; and, secondly, consider the bearing of the acts of the bishop and his agents with respect to Crosse Farm upon the rest of the case. He then continued:—

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One question I have had to consider has been, whether the vendors are entitled to the common reference as to title,—for they have not contended for more than this,—or whether, in the circumstances of the case, the delay which has taken place in filing the bill is or is not an answer to the plaintiffs' claim to specific performance, although a good title should have been shown before the 20th of August, 1841, or can now be shown.

In considering this question I can state two propositions, about which individually I entertain but little doubt. First, if the plaintiffs had immediately on the receipt of the bishop's letter of the 20th of August, 1841, or had within a reasonable time afterwards, filed their bill, I should have had no doubt of the vendors' right to the common reference as to title. Secondly, if the plaintiffs had simply acquiesced in the notice of the 20th of August, 1841, and had delayed filing their bill till the 30th of August, 1843, the Court ought to have admitted such conduct as an answer to the plaintiff's claim in this suit. Whatever the

leaning of the Court in earlier times may have been, [*219] the tendency of *the modern cases has been to hold parties seeking the assistance of the Court on bills for specific performance to the rule of equity, which requires them to be prompt in asking such assistance. And, certainly, the peculiar nature of the property in this case, and the position of the purchaser respecting it, make it a case in which, but for the acts of the parties in protracting the investigation of the title, this Court might well have considered that time, if not of the essence of the contract, was extremely material in considering whether after such delay the Court ought to interfere in it.[1] I

[1] For instances where time is considered as of the essence of the contract, see *Dart on Vendors*, chapt. 10, p. 208-9, Waterman's ed. It may be made so either by express agreement, or where, from the circumstances of the case, such must clearly have been the intention of the parties. *Ibid.* 209. For cases of the latter class see *Coslake v. Tull*, 1 Russell, 376; *Doloret v. Rothschild*, 1 Sim. & Stu. 690; *Newman v. Rogers*, 4 Bro. C. C. 391; *Withy v. Cocchi*, Turn. & R. 78; *Wright v. Howard*, 1 Sim. & Stu. 190; *Parker v. Frith*, *Ibid.* 199; *Carter v. Dean of Ely*, 7 Sim. 211; *Popham v. Eyre*, Loft, 786; *Walker v. Jeffreys*, 1 Hare, 341; *Pratt v. Carroll*, 8 Cranch, 471; *Pratt v. Low*, 9 Cranch. 456. The tendency of modern decisions has been to hold persons concerned in contracts relating to land bound as in other

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have therefore addressed myself to the question, whether the acts of the parties during the interval between the 20th of August,

contracts to regard time as material. Per Wigram, Vice-Ch. *Walker v. Jeffreys*, 1 Haro, 348.

One reason why time is not considered as the essence of the contract is, that default in payment at the time admits of compensation. Hence in equity a failure to comply with the terms of the contract on the day fixed for fulfilment, will not necessarily preclude the right to fulfil them afterwards, and a court of equity may compel corresponding fulfilment by the other party. In one case where the contract was made in 1814, for the purchase of a lot at a stipulated price, payable one-third immediately, one-third in six months, and the residue at the end of the year, a deed was to be given three months after the first payment. The vendee went into possession after the first payment, and gave a mortgage for remaining instalment, but no deed was given; before the second instalment fell due the parties made an arrangement postponing the payment of the residue of the money on the payment of interest, and the interest was paid until 1819. The purchaser in 1819 received notice that a suit was about to be instituted to recover the property under an adverse title, and he made no payment until 1825, when the suit was determined in his favor. On a bill then filed for a specific performance against the vendor, who had recovered possession of the premises in ejectment, it was held, that as the default of the purchaser in not paying the purchase money was explained and excused, by the substitution of interest for principal, and by the institution of the adverse suit, and as the first actual default was on the part of the vendor in not executing the deed at the time fixed for the contract, specific performance might be decreed. *Taylor v. Longworth*, 14 Peters' R. 172. Mr. Justice Story in that case said:—"The only substantial question in the cause is, whether, under all the circumstances, the plaintiff, Longworth, is entitled to a specific performance of the contract for the purchase: and upon the fullest consideration we are of opinion that he is, and that the decree is therefore right. We shall now proceed to state, in a brief manner, the grounds upon which we hold this opinion.

"In the first place, there is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part; or if there has, in the intermediate period, been a material change of circumstances, affecting the rights, interests, or obligations of the parties; in all such cases, Courts of Equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust.

"But except under circumstances of this sort, or of an analogous nature, time is not treated by Courts of Equity as of the essence of the contract: and relief will be decreed to the party who seeks it, if he has not been grossly negligent, and comes

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1841, and the 80th of August, 1843, have or have not kept alive for the plaintiffs' benefit the right they had on the former day?

within a reasonable time, although he has not complied with the strict terms of the contract. But in all such cases, the Court expects the party to make out a case free from all doubt; and to show that the relief which he asks is, under all the circumstances, equitable; and to account in a reasonable manner for his delay, and apparent omission of his duty.

"It does not seem necessary to cite particular authorities in support of these doctrines, although they are very numerous. It will be sufficient to refer to the cases of *Pratt v. Carroll*, 8 Cranch, 471; *Pratt v. Law*, 9 Cranch, 456, 493, 494, and *Brashier v. Gratz*, 6 Wheat. 528, in this Court; and to *Selon v. Slade*, 7 Vesey, 265; *Halsey v. Grant*, 13 Vesey, 73; *Alley v. Deschamps*, 13 Vesey, 225; *Hearn v. Tenant*, 13 Vesey, 289; and *Hepwill v. Knight*, 1 Younge and Coll. 415, in England, as affording illustrations in point.

"In applying the doctrines above stated to the facts and circumstances of the present case, the first remark that occurs, is, that the first default was on the part of Taylor. By his contract he undertook to make a deed of general warranty of the premises in the course of three months after the date of the contract; the second instalment not being payable until a long time afterwards. He never made any such deed, or offered to make it; and if he had, it is obvious, that instead of his being placed in the situation of a defendant in equity, as he now is, he would have been compelled to be a plaintiff either to enforce a specific performance, or to rescind the contract. Now, the plain import of the words of his contract is, that he will make the deed. The excuse for the omission is, that it was the duty of the other side to prepare and tender a formal deed to him for execution. And authorities are relied on, principally from the English Courts, to show, that in all cases of this sort, the established rule is, that the vendee shall prepare and tender the conveyance. This is certainly the rule in England, founded, doubtless, upon the general understanding and practice among conveyancers, as well as upon the peculiar circumstances attendant upon conveyances in that country. The same rule does not seem to have been adopted generally in America, although it may be adopted in some states. In Ohio, the rule is stated by the learned judge who decided the present case, not to prevail; and the local practice, in a case of this sort, ought certainly to constitute the proper guide in the interpretation of the terms of the contract. But waiving this consideration, let us proceed to others presented by the case.

"Up to the close of the year 1819, there is no pretence to say that there had been any violation of the contract on the part of Longworth; and no step whatever was taken by Taylor, until he brought the ejectment in 1822, to enforce the contract. That ejectment he asserts in his answer to have been brought in order to compel Longworth to complete the contract, or to put an end to it. In the meantime, Longworth had been left in the possession of the premises under the contract, had made improvements upon them, and had received the rents and profits with the acquiescence of Taylor. Under such circumstances, where there had been a part

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Here, again, I may state a conclusion to which I have come upon this point,—namely, that, in considering how for the delay

performance, and large expenditures on one side, under the contract, and acquiescence on the other side; it would be incompatible with established doctrines, to hold that one party could, at his own election, by a suit at law, put an end to the contract. It could be rescinded by Taylor only, by the decree of the Court of Equity; which decree would, of course, require full equity to be done to the other party, under all the circumstances. Pending the ejectment, Longworth made several propositions for payment, varying from the original conditions, all of which were declined by Taylor; although it seems that Longworth supposed that some of them would have been satisfactory. The recovery in the ejectment was, of course, successful, as the legal title was in Taylor; and the equities of Longworth could not be matters of defence to that suit.

"The present bill was brought in the succeeding year; and the question is, whether, under all the circumstances of the case, Longworth is now entitled to a specific performance of the contract, upon his paying all the arrears of the purchase money. Undoubtedly, if there were no grounds of excuse shown accounting for the delay on his part to fulfil the contract, between September, 1822, when the ejectment was brought, and June, 1825, when the present bill was filed; there might be strong reason to contend that he was not entitled to a specific performance of the contract, even if some other relief on account of his improvements might be deemed equitable. But in point of fact, the adverse claim of Chambers and wife to the property, was made known as early as the year 1820; and was asserted by counsel, who were consulted on that occasion, to be valid. The claim was prosecuted (as has been already stated) by a suit in equity, brought in 1823, against Taylor, Longworth, and others; and remained undecided until the close of the year 1829. There is no pretence to say, that this claim was not bona fide asserted, or that Longworth brought it forward to cover his own default. While it was known and pending, there is as little pretence to say, that Longworth could be compelled to complete the contract on his side; or that he had not a right to lie by, and await the decision of the title, which thus hung, as a cloud, upon that of Taylor. It is one thing to say, that he might waive the objection, and require a conveyance on the part of Taylor; and quite another thing to say, that he was compellable, at once, to elect at his peril, either to proceed on the contract, or to surrender it. There is no ground to assert that from the commencement of the present suit, Longworth has not always been ready and willing to pay up the arrears of the purchase money, and to complete the contract. The proofs in the case are entirely satisfactory on this head. In our opinion, the lapse of time is fairly accounted for by the state of the title; and therefore, Longworth has not been guilty of any delay, which is unreasonable or inexcusable."

That mere lapse of time is not enough to defeat the specific execution of a contract, see *Mason v. Wallace*, 3 M'Lean, 148; *Sarter v. Gordon*, 2 Hill's Ch. R. 121; *King v. Hamilton*, 4 Peters, 311; *Gatchell v. Jewett*, 4 Maine, 350; *Waters v. Travis*, 9 John. 450; *Wright v. Reeside*, 2 Dessaus. 378; *Hepburn v. Auld*, 5 Cranch,

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of the plaintiffs in instituting the suit is to operate against them, I think the interest between the 20th of August, 1841, and the 17th of January, 1842, must, as a mere question of delay, be excluded. The bishop's advisers, during that interval, have in the correspondence cautiously, and I think effectually as far as they could do it, preserved to him such benefit, if any, as the mere act of declaring the contract to be rescinded on the 20th August,

252; *The Dutch Church v. Mott*, 7 Paige, 77; *Alerton v. Johnson*, 3 Sandf. Ch. R. 73. Time is not generally deemed, in equity, to be of a contract; unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. *Voorhees et al. v. De Meyer*, 2 Barbour's S. C. Rep. 37.

In the case last cited it was held that the fact that the vendor had suffered the purchaser to remain in possession of the land, and had received payment from him from time to time on account of the contract claim, to a short period previous to the filing of the bill by the purchaser for a specific performance, was strong evidence that neither party intended that a failure to perform the contract at the time specified, should forfeit the right of the party failing to have a specific performance. That the vendor in such a case, after having suffered the purchaser to remain in possession, making improvements upon the land for many years after the time when he had a right to insist upon payment, and after having during that time received several payments from the purchaser upon the contract, could not be allowed, when called upon to perform, on his part, to insist upon a forfeiture, on the ground that the contract had not been performed within the stipulated time.

In *Wiswall and Price v. McGowan et al.* 2 Barbour's S. C. R. 270, it was held, that although Courts of Equity sometimes interfered in favor of parties who were not ready to perform their agreement at the day, when, in their opinion, the time specified in the contract for its fulfilment was not essential. Yet when further indulgence was granted it should be only in extreme cases, where a party has failed through some unforeseen accident, or where there was something indicating a waiver of the objection by the other party. That it was for the parties themselves to settle the terms of their agreement, and Courts have no power to determine which of those terms were or were not material. That when the parties themselves had by a new agreement extended the time for the performance of the contract, that was evidence that the parties to such contract deemed the time material.

See also, *Milward v. Earl Thanet*, 5 Ves. 720, n. (b); *Benedict v. Lynch*, 1 Johnson's Chancery Reports, 370. Chancellor Kent in the latter case stated the general principle to be, that time was a circumstance of decisive importance; but it might be waived by the conduct of the parties. It was incumbent upon the party seeking specific performance to show that he had used due diligence, or, if not, that his negligence arose from some just cause, or had been acquiesced in. That it was not necessary for the party resisting the performance to show any particular injury or inconvenience. It was sufficient if he had not acquiesced in the negligence of the other party, but considered it as releasing him.

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1841, would give him: they have not declined continuing the examination of the title, or considering the expedients (whether in fact or by argument) by which the title might be shown to be good, or made so; but this has always been done, and I think effectually done, under a protest which gave to the correspondence, so far as the bishop was concerned and had power to do it, the character of a treaty for the renewal of the rescinded contract, and not the continuation *of an unin- [*220] terrupted and subsisting contract. I cannot, however, think that the vendors were in any default by not having filed their bill whilst that treaty, however modified by the protest of the purchaser, continued: and I therefore regard the treaty between the 20th of August, 1841, and the 17th of January, 1842, as material only for the purpose of showing what was the position of the parties on the latter of those days.

Soon after the receipt of the letter from the vendors' solicitor, of the 1st of September, 1841, the bishop made a formal entry upon the manor, on the ground that the lease of March, 1828, was invalid. The lease to Mr. Saunders was then granted, in respect of which he was made a defendant in the suit. From the time of the formal entry of the bishop, and the intimation of that act which was given to the vendors, the vendors knew that the bishop was continuing to act upon the notice, or, at all events, that he was claiming to act by his title paramount, and not under the agreement. It is clear that, as far as he could, the bishop meant by that act to assert his right to claim under the title paramount.

In the month of February, 1842, I consider the correspondence to have ended, so far as it is material to consider it for any of the purposes of this suit; and I have no evidence explaining the delay which took place from that time down to the time of filing the bill. I have looked through the bill with a view to this point, and I do not find that the bill makes any case on the subject of delay. The position, then, of the vendors and purchaser in this case was this:—on the 20th of August, 1841, the purchaser had taken on himself to declare the contract at an end. For the reasons I have already mentioned, I have not considered

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the interval between that day and the 17th of January, [*221] 1842, as *furnishing an argument on the ground of delay merely; but in that interval—on the 16th of November, 1841—the purchaser gave notice, that if the title was not completed within two months from that day he would fall back on his original position under the rescinded contract. When, therefore, the 17th of January, 1842, arrived, the vendors were put at arms' length in contest with a purchaser who first, on the 20th of August, 1841, and afterwards, on the 16th of November of the same year, had given notice of his intention to treat the lease of March, 1823, as void, and had acted upon that view of the law—(I still exclude the question as to *Crosse Farm*)—by entering upon the property, and by holding it adversely to the vendors, as far as he could do so. If it had not been for *Crosse Farm*, to which I have yet to refer, and to the fact that the bishop allowed the deposit of 1600*l.* to remain unrecalled, there would not be a single act which could be suggested as an explanation of the delay.

In the month of May or June, 1843, the bishop brought an ejectment, and also an action to recover back the deposit. Upon this the communication between the parties was renewed. The purchaser's solicitor says, "You know we consider the contract as at an end;" but it was, nevertheless, agreed that counsel should meet and consider whether the difficulties could be overcome. The bishop's counsel, as I understand, were still of opinion that the objections to the title remained; and, if so, the bishop could not, of course, be advised to pay his purchase-money to parties who, upon the supposition that the plaintiffs could not show a good title, were not the persons to receive it. The life of Mr. Hole, it will be remembered, kept alive the old lease intended to be surrendered in March, 1823. He is still alive.

[*222] *I will next advert shortly to the cases which were cited by counsel, as bearing upon the plaintiffs' delay. They were all, except *Taylor v. Brown*(a) and *King v. Wilson*,(b) examined by me in *Walker v. Jeffreys*.(c) The excepted cases

(a) 2 Beav. 180.

(b) 6 Id. 124.

(c) 1 Harv. 341.

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appear to me to follow up and confirm the principle of those I have referred to; and to these may be added the cases of *Stewart v. Smith* and *Cooper v. Emery*, which I find are not reported. I have a note of the case of *Stewart v. Smith*.(a) The *contract had been made in December, 1815; the de- [*228]

(a) The Reporter has been permitted to insert a copy of the Vice-Chancellor's note of

STEWART v. SMITH.

[*Lincoln's Inn, Dec. 16th 1824.*]

BILL by vendor for the specific performance of an agreement.

The defence was, that the abstract was never so far perfected as to enable the defendant to lay it before his counsel. That he had several times demanded back his deposit, and declared the contract at an end. That on the 5th December, 1817, he had by letter waived his former notice of abandonment conditionally, that the contract should be "immediately" completed. And that on the 8th of April, 1818, he had by a letter which referred to the former letter of the 5th December, 1817, declared the contract at an end for the last time. And that plaintiff had taken no step whatever, or noticed the subject till the 17th May, 1819, when he renewed the subject by letter, but the defendant declared that the contract was at an end.

The contract to sell was on the 20th December, 1815.

Bill filed 26th October, 1820.

Horne and *James Wigram* for the defendant, contended that it was enough that the defendant should prove laches in the plaintiff, without showing that a time was specified by him in his notice of abandonment, and cited *Hayes v. Caryll*(a) *Spurrier v. Hancock*(b) *Harrington v. Wheeler*,(c) *Marquis of Hertford v. Boore*,(d) *Milward v. Earl Thanet*,(e) *Alley v. Deschamps*.(f)

THE VICE-CHANCELLOR.—The letter of the 8th April 1818, says, it is *useless to proceed unless* the evidence required to complete the abstract be produced. That, in other words, is saying, I am willing to proceed *if the evidence is produced*; and as that letter does not specify any time within which the evidence is to be produced, I am of opinion, that, upon that letter only, the defendant could not resist the performance of this agreement. But *that* letter refers to another letter dated 5th December, 1817, in a manner which authorizes me to consider the two letters as one; and in the letter referred to, which was written after the second notice of abandoning the contract, the defendant *in substance* says, he waives his notice of abandonment conditionally only, that the evidence in question is *immediately* (that word was in the letter) produced. Now, as it is clear, according to the present law of the court, that express notice will make time of the essence of the contract *where a time is specified* and, as it is clear that the plaintiff has done nothing since April, 1818, dismiss the bill.

(a) 5 Vin. Ab. pl. 18, p. 538.

(b) 4 Ves. 687.

(c) Id. 686.

(d) 5 Ves. 719.

(e) Id., n.

(f) 13 Ves. 225.

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fendant had declared the contract at an end, but had, by a letter of the 5th of December, 1817, waived his notice of abandonment, upon the condition that the contract should be immediately completed, and that letter was referred to in another letter, of the 8th of April, 1818. The bill, which was not filed until the 26th of October, 1820, was dismissed. In *Cooper v. Emery* the bill was not, I think, dismissed, but the circumstances were very complicated.

My decision in the present case should, I think, be governed by the cases I have referred to, subject only to the question whether the plaintiff's right is not saved by the points I am about to notice.

The first relates to Crosse Farm; and with respect to that, upon what is found in the admissions, it appears to me that the circumstances which took place, were the clear result of a mutual arrangement between the parties. Throughout the correspondence, and the admissions, reference is made to the [*224] agreement as to what was to be done *with respect to Crosse Farm. I do not think, therefore, that the question is affected by the acts of either of the parties, with reference to this part of the property. Secondly, assuming the case to be in other respects clear, my opinion is that it was not necessary that the bishop should have first given up possession of Crosse Farm, taken under the circumstances I have already mentioned, before he insisted on rescinding the agreement. It was said that the bishop, having more or less acquired such possession as he had in consequence of the contract, could not retain that possession, and at the same time contend that the contract was void; but that he ought to have given up the possession, and then, if necessary, have re-entered. I am satisfied that he was not bound to take that course.

Thirdly, with respect to the deposit, I understood that the money was in medio, and if so, it would be the more favorable to the defendant's case; for, if (as it is said) the money had been paid to the plaintiffs, the bishop was in some sense leaving the contract in part performed, while the money remained in their hands. That circumstance, however, was to the prejudice of the

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bishop himself, after notice had been given; and the case of *Watson v. Reid*(a) is an authority that the omission to require re-payment of the deposit will not deprive the party of his right to insist that the contract is rescinded, where he had taken other sufficient steps for the purpose; but I do not think authority upon the point is wanted.

A fourth question is, whether I ought to direct a special reference whether a good title was shown on the 17th of January, 1842. Mr. *Parker* has argued, that if *a good [*225] title had in fact been shown on that day, the purchaser has been in the wrong ever since that time, and that the Court ought not to dismiss the bill, but ought to ascertain that fact, by referring it to the Master to inquire whether a good title had been shown on the 17th of January. I cannot accede to that argument. I think the mere statement by the party, that he has shown a good title, is not enough. I thought myself bound to attend to the argument on the title, as far as was necessary to satisfy myself that the bishop's objections were not colorable; and being well satisfied of that, and (to say the least) being satisfied also that the vendors would have great difficulty in persuading a court of equity to compel a purchaser to accept such a title, I think the cases I have before mentioned apply. With the exception of as much of the costs of the suit as have been occasioned by the supplemental answer filed by the defendant, I think the bill must be dismissed with costs.

Mr. *Romilly*, for the defendant, asked that the decree might direct the return of the deposit to the purchaser: *Bryant v. Bush*,(b) *Lord Anson v. Hodges*.(c) That this is the rule of the court on the dismissal of the vendors' bill, has been repeatedly affirmed.(d) The plaintiffs, by filing their bill in this court, submit to the jurisdiction, and bind themselves to do what is right

(a) 1 Russ. & Myl. 236.

(b) 4 Russ. 5.

(c) See 1 Dr. & War. 65, (*Butler v. Earl of Portarlington*), and 2 Dr. & War. 79, (*Graves v. Wright*), by Sir E. Sugden, L. C. of Ireland.

(d) 5 Sim. 227.

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in the subject matter of the suit: 1 Sugd. V. & P., p. 80, 10th ed.

Mr. *James Parker*, for the plaintiffs, contended that this was not a case in which the Court would order the deposit [*226] *to be returned. The argument on behalf of the plaintiffs had been, that a good title was in fact shown. For the defendant, it was argued that a good title had not been shown. The decision of the Court had left the question of title untouched, and had dismissed the bill on the ground of laches. The dismissal of the bill on that ground was consistent with the right of the vendors to retain the deposit, for it left the legal rights of the parties undisturbed; and the possession of the deposit, until a court of law should have determined whether the purchaser was entitled to recover it, is one of such legal rights. The course of the Court in such cases is clear: where the vendor's bill has been dismissed, there have been cases in which the Court has ordered the deposit to be returned, but that has been where the vendor cannot make a good title, and where, therefore, the purchaser would be entitled to recover the deposit at law, and the relief is given in equity to avoid circuity of remedy or multiplicity of suits. Where the purchaser's bill is dismissed, the Court does not order the deposit to be returned, for the purchaser in that case is the party in the wrong, and the Court cannot decide that he is entitled to the deposit: that is a legal question, independent of the suit. A decree that the deposit should be returned, would, in fact, amount to a decision that the deposit could be recovered at law; and it would, therefore, be a decision on the question of title, to the effect that the plaintiffs could not sustain their action at law upon the contract, from their inability to perform it,—a point upon which the Court had given no opinion.

Mr. *Romilly*, in reply.—The ground on which the relief is refused to the vendor is immaterial. If the vendor be not entitled to a specific performance of the contract, it cannot reasonably be said that he is entitled to keep a fifth part of the purchase-

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money, without having given any *consideration for it. [*227] It is admitted by the argument for the vendors, that if the purchaser can recover the deposit at law, this Court would decree its repayment, to avoid circuitry of action; and it follows a fortiori, that if the deposit cannot be recovered at law, the Court will give the purchaser that relief; that is the case in the present suit; for the reason on which the Court has dismissed the bill are reasons which would have no weight in the action at law.

August 10th.—VICE-CHANCELLOR:—In this case I dismissed the vendor's bill without allowing him an opportunity of making out his title. I did so upon the sole ground of the vendor's delay in filing the bill after the purchaser had given him distinct notice that he asserted a right to rescind the contract, and considered it at an end. I so decided upon the authority of many cases, to which I referred, in one of which Sir John Leach dismissed the vendor's bill, because he did not file it until the expiration of a year after the purchaser had declared the contract at an end. The only question now is, whether, having so decided, I am to order the vendor to repay the deposit, or leave the purchaser to recover it by action at law. I shall not in this case question the authorities relied on by the purchaser. It is sufficient for the present purpose to say, that, whether the order dismissing the bill shall be accompanied by an order for the return of the deposit or not, must depend upon circumstances. It is no uncommon thing for the Court to dismiss a bill, intending thereby to leave parties to their legal remedies, and upon the express ground that they are entitled to what the law will give them, though not entitled to the extraordinary assistance of a court of equity.(a) In such a case an order for the re- [*228] turn of the deposit would be inconsistent with the principle of the decree.

If, in the present case, the purchaser could make out that the decree dismissing this bill has, in this Court, deprived the vendor

(a) See *Mortlock v. Butler*, 10 Ves. 292.

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of his legal remedies upon the contract, the case might be one in which it would be right to order the deposit to be restored. But, if he cannot make out that case—that is, if he cannot make out that the decree of this Court would enable him to sustain a bill to restrain an action by the vendor for the balance of the purchase money, I think I ought not to make an order respecting the deposit. I certainly did not intend to do more than leave the vendor to such rights as the law would give him.

With reference to this principle, it is to be remembered that a decree for specific performance would give the vendor the largest amount of damages to which his contract would entitle him, whereas the damages in an action for non-performance of the contract may possibly be measured by a different scale. .

I think I ought not to make an order for the return of the deposit.

Upon the conclusion of the judgment dismissing the bill, counsel were instructed to say, that the Bishop of Exeter was still willing to pay the plaintiffs the stipulated price for their interests in the premises, (subject to his costs,) upon their making a satisfactory title, by procuring the concurrence of all necessary parties, or otherwise, without insisting, as against them, upon the paramount title in right of the see.

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1847: 12th June; 2nd July.

A. and B., in 1838, filed their bill for the administration of an estate, of the residue of which they were each entitled to one third. In 1840 they changed their solicitor in the cause, and appointed F. as such solicitor, who so continued until 1843, when they again changed their solicitor. F. then brought his action against A. (B. having gone out of the jurisdiction) for the amount of his bill of costs, and, in June, 1844, he recovered and entered up judgment in such action. In June, 1845, F. filed his bill for foreclosure under the statute 1 & 2 Vict. c. 110, as against A.'s third part of the property, the subject of the first suit. In July, 1846, F. obtained the common decree for foreclosure against A., and default being made on the 23rd of March, 1847, the order for foreclosure was made absolute. The order absolute was then enrolled. A. had no property except that to which she was entitled in the first suit, but the value of the property to which she was entitled in that suit was three or four times the amount of F.'s judgment-debt and costs. The Master had made his report in the first suit, and the cause stood for hearing on further directions and on exceptions, when, on an application in June, 1847, the Court enlarged the time appointed by the Master for the payment of the debt and costs, notwithstanding the order absolute, and notwithstanding its enrolment.

A MOTION by the defendant, whose property had been charged with a judgment debt, under the stat. 1 & 2 Vict. c. 110, to enlarge the time appointed by the Master for the payment of the principal, interest, and costs found due to the plaintiff, notwithstanding an order which had been made foreclosing the defendant absolutely. The order for foreclosure absolute had been enrolled.

Mr. Wood and Mr. Goodeve, for the motion.

Mr. Romilly and Mr. Randell, contra.

The cases mentioned in the judgment, and *Burgh v. Langton*,(a) and *Anon.*, 1 Barnardiston, 221, were cited.

(a) 15 Vin. Ab. (Z.), pl. 2, p. 476.

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VICE-CHANCELLOR:—The defendant, Ellen Miles Wastell is one of the three children of William Wastell, deceased; and upon his death she became entitled to one-third of a sum of 4000*l.*, charged by the marriage settlement of her parents upon the estates of her grandfather, Sir John Miles; she is also entitled to one-third of the residuary real and personal estate of Sir John Miles, under his will. On the 12th of January, 1838, the defendant, and Harriet Ann Wastell, her sister, who [*230] *had a similar interest under the will, instituted the suit of *Wastell v. Leslie*, to have the accounts taken of the real and personal estate of Sir John Miles, and the trusts of his will executed under the decree of the Court. By the decree in that cause, and other causes supplemental thereto, certain accounts and inquiries were directed, and it was ordered, among other things, that an annuity of 200*l.* a year should be paid to the defendant, and that that sum should go in part of the sum of 4000*l.*, to one third of which she was entitled under the settlement. The report was made in this cause, exceptions were taken, and the case is set down upon the exceptions, and for further directions. It is certainly a subject for remark, that this should be the state of an administration suit nearly ten years after its institution.

At the time of the institution of that suit, Messrs. Hicks & Marris acted as solicitors for the defendant and her sister, and continued so to do until June, 1840, when they were discharged, and Mr. Charles Ford, the plaintiff in the present suit, became the solicitor for the plaintiffs in that cause. Mr. Ford continued to conduct the cause until January, 1843, when he also was discharged, and the management of the suit was entrusted to other solicitors. Mr. Ford, upon being discharged, brought his action against the defendant, Ellen Miles Wastell (her sister, Harriet Ann, having married and gone abroad,) for his costs in the suit of *Wastell v. Leslie*, and (as I will assume) for other costs. In June, 1844, he obtained judgment in the action for 43*l.* 1*9s.* 10*d.*; on the 18th of June, 1844, that judgment was entered up; and on the 25th of June, 1845, Mr. Ford instituted the present suit for foreclosure, under the stat. 1 & 2 Vict. c. 110, of all

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the defendant's interest in the property the subject of the suit of *Wastell v. Leslie*. In July, 1846, the common decree for foreclosure was made, and in *December, 1846, the [*231] Master by his report found the sum of 574*l.* 12*s.* to be due to the plaintiff in respect of his judgment debt, interest, and costs, and he appointed the 18th of March, 1847, for payment of that sum. That report was confirmed. The money was not paid on the 18th of March, 1847, and on the 23rd of March, 1847, an order was made that the defendant, Ellen Miles Wastell, should stand absolutely debarred and foreclosed of and from all right, title and interest in the undivided third part of property the subject of the suit of *Wastell v. Leslie*. That order was afterwards enrolled.

On the 4th of June, 1847, on behalf of the defendant Ellen Miles Wastell, notice was given of a motion for the 12th of June, 1847, that notwithstanding the order of the 23rd of March, 1847, the time appointed by the Master's report for payment of the sum found due to the plaintiff for principal, interest, and costs, might be enlarged for six calendar months, or to such other period as the court might direct. The notice of motion does not seek to discharge the order of March, 1847, but asks that the time may be enlarged notwithstanding that order. Upon looking at the precedents, it appears that the common form of application is, that the order may be discharged upon payment of the money at the expiration of the enlarged time, and that, upon failure of payment, the order should stand; but I should not have allowed the difference in the form of the application to have stood in the way of my giving relief.

The case upon the merits is this: that the defendant has no property whatever except that which is the subject of the suit of *Wastell v. Leslie*; that she had become totally destitute of the means of providing for her own livelihood by reason of the non-termination of that suit, *and that she was de- [*232] pendant on the bounty of a friend for the necessaries of life; that she had every personal motive to accelerate the termination of the suit, but that she had hitherto been unable to do so; that the plaintiff's debt consisted of costs incurred in the

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prosecution of the cause of *Wastell v. Leslie*, and that those costs would be paid out of the fund to be administered in that cause. The defendant says, that the amount of her share in the testator's estate so to be administered is five or six times as great as the amount of the debt; that she fully expected that the suit of *Wastell v. Leslie* would have been terminated before the time appointed by the Master for payment of the money, but that the suit had in some degree been delayed by the plaintiff insisting that he ought to be made a party thereto in respect of the charge sought to be enforced by him in the present suit; that the accounts in *Wastell v. Leslie* have been taken, and the report made; that one exception has been taken, and the cause set down upon the exception and on further directions.

On behalf of the plaintiff, Ford, it was represented that the debt in respect of which he recovered the judgment consisted of costs in the cause of *Wastell v. Leslie*, of costs in the action, and other costs but the plaintiff does not in his affidavit define what those other costs are. He then controverts the affidavit of the defendant as to the value of the property. But, attending to the opportunity, which Mr. Ford had, in the two years and a half during which he had the management of the suit, of knowing the value of the property, and also of the nature of the suit, I am satisfied that I may safely conclude that the value of the property is three or four times the amount of his debt; and that the plaintiff cannot successfully impugn the proposition relied on by Ellen

Miles Wastell, that she was justified in expecting
 [*233] *that this administration suit would have been terminated before the time fixed by the Master for the payment of Ford's debt. The defendant's case is left untouched by the affidavits filed by the plaintiff in this cause, except to the extent I have mentioned. The question I have to consider is, whether that case shows a sufficient ground for the present motion.

In *Nanny v. Edwards*,^(a) the Lord Chancellor said that the Court requires some merits to be shown to enlarge the time,

(a) 4 Russ. 124.

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(though a very strong case may not be required,) but in that case no excuse was given. In *Eyre v. Hanson*,^(a) a similar doctrine is laid down. The facts of the last case are rather an authority for the present application, so far as it shows the ground upon which the Court will enlarge the time rather than allow a mortgagee by foreclosure to obtain an estate greatly exceeding the value of his debt. *Edwards v. Cunliffe*^(b) is also an important authority for the mortgagor in the present case. The cases cited in *Jones v. Creswicke*^(c) show that the court does not require a stronger case than the present to grant the indulgence; and if the case had turned solely upon the merits, I should certainly have granted the relief asked.

Objections, however, have been taken in point of form. First, (excluding the fact of the enrolment of the order absolute,) the question is suggested, whether the order of the 23rd of March last, making the foreclosure absolute, is a conclusive answer to an application to enlarge the time, or whether the difficulty which that order presents may not in some way be overcome? *Jones v. Creswicke*, and the cases there cited, are an answer upon that point. It is clear that the Court may and will enlarge *the time for payment of the mortgage-money after the [*284] order for making the foreclosure absolute, by directing the order to be discharged upon the condition that the money be paid at the expiration of the enlarged time, and in default of such payment that the order should stand.

The next point insisted on by the plaintiff was, that the enrolment of the order of the 23rd of March, 1847, making the foreclosure absolute, prevented the Court from interfering. One reason why I have gone into the case so fully, is, that it appeared to me at the time of the argument, that the objection could not be sustained to the extent contended for. If, indeed, it were necessary that I should rehear the order of the 23rd of March, 1847, the objection must prevail. I cannot re-hear an order that is enrolled. The Lord Chancellor, however, would be equally without jurisdiction in that respect, and the House of Lords could

(a) 2 Beav. 478.

(b) 1 Madd. 287.

(c) 9 Sim. 304.

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only rehear it,—but for what purpose?—for the purpose of deciding whether the order was proper at the time it was made,—a matter not in dispute. The House of Lords could not interfere upon an original application to enlarge the time. But the object of the present application is, not to dispute the propriety of that order at the time it was made;—the ground of the application, admitting that order to have been originally right, was that upon matter subsequent to the order, the Court ought to enlarge the time for payment of the money. In *Coker v. Beavil*,^(a) cited at the bar, that was the ground on which the relief was sought, and on the matter subsequent to the order the Court granted the application. If I am right in saying that, for the purpose of granting such indulgence in a proper case, the order of the 23rd of March, 1847, if not enrolled, might have been [*235] discharged, the *question on that part of the case is, whether I might not, for the same purpose, order the enrolment to be vacated. The case being, on the merits, a proper case for enlarging the time, the enrolment is no impediment to an order being made for that purpose by a court of competent jurisdiction. For this, two of the cases cited in the note to *Jones v. Gosselcke*,^(b) are authorities, and so also is the case of *Coker v. Beavil*.

The remaining question is, whether, as Vice-Chancellor, I have power to order the enrolment to be vacated. I thought at one time I might have got over the difficulty by founding my order on the matter subsequent, and making it, notwithstanding the order of the 23d of March, 1847; as upon a bill of review I might supersede the original decree, though signed and enrolled. It appears to me, upon further consideration, that the proper order to be made, in order to give the indulgence which she seeks, must be an order to vacate the enrolment and discharge the order of the 23d of March, 1847, on condition that the money be paid on the further day appointed, and if the money be not then paid, that the order as enrolled shall stand. This, at least, is the form of previous orders, and I will not introduce a new form of order

^(a) 1 Rep. in Chan. 253.^(b) 9 Sim. 317, n.

 1848.—Bird v. Heath.

upon my individual opinion. I find, however, that no applications to vacate an enrolment have been made except before the Lord Chancellor, and I therefore very reluctantly refuse, on that ground, to make the order. I entertain no doubt as to the merits of the case, but for the reason I have stated, I think the application should be made to the Lord Chancellor.

The motion was then made before the Lord Chancellor, who (4th May, 1848) enlarged the time for foreclosure *until the second seal of the then ensuing Michaelmas [*236] Term. His Lordship said that the enrolment of the order absolute did not prevent the time from being enlarged, where, on the merits of the case, the defendant was entitled to that enlargement.

 BIRD v. HEATH.

1848: 29th April; 6th May.

The accidental omission of an usual term or direction in a decree or order is an error which may be corrected by petition under the 54th Order of April, 1828; but not so the omission of any term or direction which would only have been introduced under the express judgment of the Court.

The representative of a mortgagor, who had obtained a decree for redemption, ordered, on the petition of the mortgagee, to produce the original decree for the purpose of correction.

The lien of a solicitor in the cause held not to entitle him to withhold an original order of the Court in which there was an accidental error that required correction.

THE decree for redemption in this case had omitted the usual direction to the plaintiff to pay what should be found due, "within six months after the said Master shall have made his report."^(a)

The plaintiff died after the decree was made, and his representative did not prosecute the suit. The defendant then filed his

(a) See Seton on Decrees, p. 145.

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supplemental bill to carry on the accounts, in order that, by proceeding with the cause, the representative of the mortgagor might be compelled either to redeem the estate, or be foreclosed upon his default. The original decree was in the possession of the representative, who had been also the solicitor for the deceased plaintiff; and the defendant (the mortgagee) presented his petition, praying that the decree might be corrected by inserting the words "within six months," &c., and that the representative might produce it to the registrar of the Court, and leave the same with the clerk at the entering-seat for the purpose of having the correction made in the entry of the decree.

Mr. *Rogers*, for the petition.—The omission must be [*237] *regarded as a clerical error, which the Court will correct under the Order XLV. of April, 1828. The order originally delivered out is the only one in which the correction can be made; and the plaintiff's solicitor, who is an officer of the Court, will not be permitted to impede justice by withholding it.

Mr. *Speed*, for the respondent, objected to the order asked by the petition: first, because it did not distinctly appear that the original decree was in his hands: he had in his possession a parcel of papers relating to the cause, which he had sealed up for the benefit of the parties entitled to them, but he had not examined it to see if the decree was amongst them. Secondly, because the insertion of an entire sentence in the decree could not be deemed a clerical error, which properly would comprehend only a correction of names, dates, or sums; and, lastly, because the representative of the deceased plaintiff, in his character of solicitor, claimed a lien on all the papers in the cause, upon which claim he had insisted in his answer to the supplemental bill. He was willing to give up the papers on the payment of his debt.

The VICE-CHANCELLOR said, that where the correction sought to be made in an order required the insertion of matter which could not have been introduced by the registrar, as of course, when the order was made, but which required the judgment of

1847.—Bird v. Heatli.

the Court to be pronounced upon it, the case was not one which fell within the 45th Order of 1828; but where the correction was of a nature which would have been included under a direction for the "usual order," applicable to the case, without any specific expression of the judgment of the Court, he considered the case to be within *the 45th Order; that in this case [*238] it was clearly a matter of course to insert the direction for payment within six months, and the absence of these words was a plain slip or omission: that the respondent should have an opportunity of searching the papers in his possession relating to the cause, and, if the decree were not among them, he might be heard on an affidavit of that fact at the next seal: that if the document was in his possession, it must be produced for correction according to the prayer of the petition: that the document would not be taken from the custody or power of the respondent, nor would any lien which he might have on the papers in the cause be disturbed, but he could not be permitted to avail himself of the accidental omission of a passage in the decree, to deprive the opposite party of the benefit of the suit, except upon the terms of paying his costs.

May 6.—No affidavit being produced, the order was made.

 1847.—Williams v. Teale.

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*WILLIAMS v. TEALE.

1847: 7th, 8th, and 22nd May; 19th June; 5th July.

Devise and bequest of freehold and leasehold estates to trustees, upon trust, after paying certain annuities, to settle the same, so that, as nearly as the rules of law and equity would permit, the testator's six younger children should receive the rents and profits in equal shares during their lives, with benefit of survivorship if any of them should die without leaving issue, and, if any should die leaving issue, that the child or children of him or her so dying, during the lives of his said other children and of the survivor, should take the share of him or her so dying of the said rents and profits; and that, upon the death of all his said other children, as to the leasehold estates, the same to go and belong to the issue of his said other children for their respective lives, in equal shares, with benefit of survivorship; and as to the freehold estates, the issue of his said children to take the rents, profits, and proceeds thereof for their respective lives, in equal shares, with benefit of survivorship in case of the death of any of such issue without leaving issue, and if any of such issue of his said children should die leaving issue, the child and children of him or her so dying, during the lives of such issue of his said children and of the survivor of them, should take the share of him or her so dying; and after the death of all the issue of his said children, then, as to the said leasehold estates, the same to go and belong to the child and children of such issue absolutely as tenants in common; and as to the said freehold estates, in case the issue of his said children, or any of them, should leave issue living at the decease of the last survivor of the said issue, then that the same should be to the use of the child and children of the bodies of the issue of his said children, and of the heirs of the body and respective bodies of such child and children, and, if more than one, equally to be divided amongst them as tenants in common; and if there should be a failure of issue of the body or bodies of any such child or children, then, as to the original and accrued shares of such child or children whose children should so fail, to the use of the remaining and other and others of the said children, and the heirs of the body or bodies of such remaining and other children, and, if more than one, equally as tenants in common; and in default of such issue of his said children, to the use of the right heirs of the testator. The six younger children of the testator survived him. Some of them had children at the time of his death, and some had children born after his death.

Held, that the six younger children of the testator took life interests in both the freehold and leasehold estates, with remainder, as to the freeholds, to the children of such younger children as tenants in common in tail, with cross remainders between and among them, and the ultimate remainder to the testator's right heirs; and, *semble*, that the same children of such younger children (after the decease of the last survivor of their respective parents, the tenants for life) take absolute interests in the leaseholds.

That, in considering the validity of the limitations, the state of the family at the

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death of the testator (and not at the date of his will) is to be regarded; and, therefore, if a gift be to such of the children of a particular parent as shall attain a greater age than twenty-one years, and the parent die in the lifetime of the testator, and the class be ascertained at the testator's death the gift is valid.

That the limitation to the unborn children of the testator's children for their lives was not void for remoteness only, because it was a gift to persons who might be unborn at the death of the testator.

That where, upon the decease of the testator's "children," the estate was given to the "issue" of such children, and where it was given over in case the testator's "children" should die "without leaving issue," and in like uses of the word *issue*, the word "issue" must read "child or children," although, in other parts of the will, it might be necessary to read the word "issue" in a different sense.

Where it is referred to the Master to approve of a settlement in pursuance of an executory trust, the court does not usually insert in the order declarations as to the interests which the parties are thereafter to take, but merely directs the Master to approve of a settlement in conformity with the will, articles, or other direction upon which it is to be founded.

THE questions in the cause were, to what extent the directions contained in the will of Joseph Teale, for the settlement *of his real and personal estate, were inconsistent with [*240] the rule as to perpetuities, and therefore void, and what effect should be given to such of the same directions as were not void.

The will was dated the 15th of July, 1831. The testator thereby devised his freehold estates to trustees and their heirs upon trust that they, and the survivor of them, and the heirs of the survivor, and their or his assigns, should immediately, or as soon as might be, after his decease, convey, settle, and assure (with and by the advice of counsel) his said freehold estates so and in such manner (or as nearly thereto as the then existing laws would permit,) that his wife Maria might, during her life or widowhood, be paid out of the rents as well of his freehold estates as of his copyhold and leasehold estates after mentioned, an annuity of 200*l.* a year, with powers of distress for securing the same, and also (subject to the same annuity of 200*l.*) so that his son Joseph should, during his life, have an annuity of £78 a year, payable out of the same estates, and that upon the death of his son Joseph there should be paid an annuity of £78 equally between the children of his son Joseph living at the time of

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his decease during their lives, and, subject to the before-mentioned annuities, that his several other children (except his son Joseph) should receive the rents and profits of his freehold estates in equal shares and proportions during their respective lives, with benefit of survivorship in case of the decease of any or either of his said other children, (his son Joseph being excepted as aforesaid,) without leaving lawful issue: and that in case of the decease of any or either of his said other children leaving lawful issue, the child or children of him or her so dying during, the lives of his said other children and the survivor of them, should and might have, receive, and take the [*241] share and *proportion of him or her so dying of the said yearly rents, profits, and produce, and such accumulation thereof as might at the time of the decease of him or her have accrued by survivorship or otherwise; and that upon the decease of all his said other children, the lawful issue of such his last-mentioned children should and might receive and take the yearly rents, profits, and proceeds of his said freehold estates, in equal shares and proportions, for and during the term of their respective natural lives, with benefit of survivorship in case of the decease of any or either of such issue, without leaving lawful issue; and that in case of the decease of any or either of such issue of his said last mentioned children, leaving lawful issue, the child and children of him or her so dying during the lives of such issue of his said children, and the life of the survivor of them, should and might have, receive, and take the share and proportion of him or her so dying of the said yearly rents, profits, and proceeds, and such accumulations thereof as might at the time of the decease of him or her have accrued by survivorship or otherwise, and so and in such manner, and to this further end and intent, that after the decease of all the lawful issue of his said last-mentioned children, in case the issue of his said last-mentioned children, or any of them, should leave lawful issue living at the time of the decease of the last survivor of the issue of his said last-mentioned children, then his said freehold estates should go and be to the use and behoof of all and every the child and children of the respective bodies of the issue of his said last

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mentioned children lawfully to be begotten, and of the heirs of the body and respective bodies of such child and children, equally to be divided between or amongst such children, if more than one, share and share alike, as tenants in common, and not as joint tenants; and if there should be but one such child, then to the use of such only child and the heirs of his or *her body; and in case there should be more than one [*242] such child, and there should be a failure of lawful issue of the body or bodies of any such child or children, then as to the original part and share, and parts and shares, of such child and children whose issue should so fail, as well as to such other part and share and parts and shares as by virtue of the present clause of his said will should have become vested in, or have accrued unto, him, her, or them, or his, her or their issue upon the failure of issue of any other or others of the said last-mentioned children, to the use of the remaining and other and others of the said last-mentioned children, and the heirs of the body and bodies of such remaining and other children, equally to be divided between and amongst such remaining and other children (if more than one,) share and share alike, as tenants in common, and not as joint tenants; and if there should be but one such remaining or other child, then to the use of that one child, and the heirs of his or her body; and in default of such issue of the lawful issue of his said last-mentioned children, or, being any such, they should die without issue, then to the use of the right heirs of him the testator for ever. And the testator directed that until such conveyance, settlement, or assurance should be made of his said freehold estates, the same should be vested in the trustees for the benefit of such persons, and in such manner and for such estates and interests as he had thereinbefore declared concerning the same, or as nearly thereto as the rules of law or of equity for the time being would allow; but subject to the proviso thereafter contained prohibiting the alienation thereof. The testator then bequeathed to the same trustees all his leasehold estates, upon trust that they and the survivor of them, and the executors and administrators of the survivor, should, upon or as soon as might be after his decease, assign,

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settle, and assure the said leasehold estates so and in such [*243] manner (or as near thereto *as the rules of law and equity would permit,)—subject to the said annuities to his wife, and his son Joseph Teale, and his children,—that his other children, (excepting his son Joseph Teale) should and might receive and take the rents, issues, and profits of his said leasehold estates, during their respective lives, in equal shares and proportions, as tenants in common (subject to the payment of the rents and performance of the covenants in the several respective leases contained,) with benefit of survivorships during the natural lives of the survivor and survivors of his said other children in case of the decease of any of his said other children without leaving lawful issue; and in case of the decease of any or either of his said last-mentioned children leaving lawful issue, then that such issue should and might receive and take, during the natural lives of the survivors and survivor of his said last-mentioned children, the same share and proportion of such rents, profits, and produce of his said leasehold estates (subject as aforesaid,) as the parent of such issue would have taken if living; and upon the decease of all his said last-mentioned children, then that his said leasehold estates (subject as aforesaid) should and might go and belong unto, and equally be divided amongst, the lawful issue of his said last-mentioned children during their natural lives, with benefit of survivorship between them; and upon the decease of all the lawful issue of such his said last-mentioned children, then that his said leasehold estates should go and belong absolutely unto, and equally be divided between and amongst, the child and children of such issue lawfully to be begotten, as tenants in common, and not as joint tenants. And the testator declared, that, until the assignment thereby directed should be made, the said leasehold estates should be held upon the trusts thereinbefore, expressed, or as nearly thereto as the rules of law or equity would permit.

[*244] *The testator died in September, 1831, leaving his eldest son, Joseph, his heir-at-law, and six younger children, William Henry, Fredrick, Martha, Maria, Elizabeth Juliette, and Esther, surviving. William Henry had one child at the death

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of the testator, and seven other children after the death of the testator. Frederick had no children at the death of the testator, but had four children born afterwards. Martha was married, but had no issue. Maria was a widow, without children. Elizabeth Juliette had married M. Williams, and had three children born before the testator's death, and three afterwards. Esther had four children born after the testator's death. The will was proved by William Henry, the son, Humphris, Bugler, and the widow, the executors and executrix and trustees named therein. The bill was filed in 1841, by five of the children of Elizabeth Juliette, against such other grandchildren of the testator as were then living—Frederick and Maria, the surviving children of the testator,—the personal representatives of the deceased children, and the executors and trustees, praying that the trusts of the will might be executed, and the rights of the plaintiffs and all other parties ascertained and declared; an account of the personal estate, and the rents and profits of the real and leasehold estates received by the executors; that the shares of the plaintiffs might be secured, and maintenance allowed to them thereout: and that the father of the plaintiffs, or some proper person, might be appointed their guardian. The Master, by his report in August, 1846, found the state of the family and the relationship of the parties.

Mr. Romilly and *Mr. Cole*, for the plaintiffs:—

The children of the testator (except the eldest) are entitled to life interests in the freehold and leasehold property of *the testator, and the plaintiffs, as the children of Elizabeth Juliette, are entitled to their mother's share of the rents and profits until the death of the last survivor of the testator's children. In the settlement to be executed, the freehold estate ought (after the life estates) to be limited to all the grandchildren of the testator excluding the children of the eldest son in tail, with cross remainders; and the leasehold estate to be limited to the same grandchildren absolutely, as tenants in common.

As to the real estate, the case comes expressly within the de-

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cision in *Humberston v. Humberston*,^(a) From the time of that decision down to the case of *Vanderplank v. King*^(b) it had been uniformly held, that, where there is a limitation to an unborn person for life, with remainder to his children or issue, the remainder is void, and such intended tenant for life will take an estate tail. It is true that in *Cole v. Sewell*^(c) Sir Edward Sugden appears to have suggested that the rule against perpetuities cannot apply to the case of remainders, and that no remainder can be too remote. But upon what foundation, except that such remainders were in certain cases void, has the doctrine of *cy pres* proceeded? Afterwards, in the same case,^(d) Sir E. Sugden says,—“the effect of the modern rule against perpetuities has been to render the old doctrine obsolete, although it has rendered void successive estates to successive unborn classes of issue.” In *Seaward v. Wilcock*^(e) Lord Ellenborough said,—“the law will not allow of successive limitations of estates for life to persons unborn.” The same doctrine is also to be found in *Chapman dem. Oliver v. *Brown*,^(f) *Nicholl v. Nicholl*.^(g) The suggestion of Sir E. Sugden may properly apply to all the several classes of contingent remainders described by Mr. *Fearne*, except the fourth.^(h) But it is doubtful whether it can properly be held to apply to the fourth class, viz. where the remainder is limited to a person not *in esse* when the remainder is created, where the contingency relates to the object of the gift. It has never yet been decided that any person is a competent object of gift who shall not necessarily be *in esse* within the period specified by the rule against perpetuities, viz. a life or lives in being and twenty-one years, and the period of gestation. In the case of executory devises and springing uses, the limitations must be so framed that they will necessarily take effect within such period: *Cadell v. Palmer*.⁽ⁱ⁾ By analogy of reasoning it might well be held that a limitation by way of remainder to an unborn person

(a) 1 P. Wms. 332, &c.

(b) 3 Hare, 1.

(c) 4 Dr. & War. 1; now on appeal before the House of Lords.

(d) *Id.* 32.

(e) 5 East, 198.

(f) 3 Burr. 1626.

(g) 2 W. Bl. 1159.

(h) See *Fearne*, Conting. Rem. p. 8.

(i) 7 Bligh, N. S. 202.

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cannot take effect or be good, unless the object of gift must necessarily come into being within the same prescribed period.

With respect to the leasehold estate, there is a conjoint executory disposition of real and personal estate, which brings the case within *Mogg v. Mogg*.(a) *Franks v. Price*.(b) In *Routledge v. Dorrik*(c) it is said that the doctrine of *cy pres* does not apply to personalty, but that was a case under a power of appointment, and not under an executory trust. The direction that the settlement should be made as near to the limitations of the will as the rules of law will permit, is, in fact a direction that the intention of the testator *shall be executed *cy pres*. The word "issue" [*247] must be read "children:" *Sibley v. Perry*.(d) In *Mortimer v. West*(e) the trusts were not executory as in *Humberston v. Humberston*, and the Court was therefore bound to construe the will as it stood; moreover, in that case the Court considered that, besides the intention to give life estates, there was an intention that the estates should not go over until there was a general failure of issue. There is no reason in this case for enlarging the life estate of the children of the testator, or for invalidating the gift to the grandchildren: *Porter v. Fox*,(f) *Bankes v. The Baroness Le Despencer*,(g) *Tollemache v. Earl of Coventry*,(h) 1 Jarman on Wills, pp. 229, n. (s), 233 and 284; 2 Id. 723; and Fearné Conting. Rem. 502; Id. 205, Butler's note.

Mr. Rolé, Mr. Rogers, and Mr. Glasse, for other grandchildren of the testator, in the same interest with the plaintiffs.

Mr. Anderdon and Mr. Rudall, for the surviving children of the testator, contended that the children of the testator took estates tail in the freehold and absolute interests in the personalty. They relied on *Hayes v. Hayes*(i) as applicable to the personal estate. The testator intended to give life estates to all his lineal descendants, a purpose which the law does not allow to be effected: *Doe*

(a) 1 Mer. 654.

(d) 7 Ves. 533.

(g) 10 Id. 576.

(b) 3 Beav. 182.

(e) 2 Sim. 274.

(h) 8 Bligh, N. S. 547.

(c) 2 Ves. jun. 357.

(f) 6 Id. 485.

(i) 4 Russ. 311.

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dem. *Everett v. Cooke*, (a) *Cotton v. Heath*, (b) *Oakes v. Chalfont*, (c) *Thomason v. Moses*, (d) *Cooke v. Bowler*, (e) *Mortimer v. West*, (f) The *cy pres* *doctrine has not been applied to personal estate: *Boughton v. James*. (g)

Mr. Wood and Mr. Wray, for the heir-at-law, argued that the devise of the real estate was throughout tainted with remoteness; and that it was not a case in which the *cy pres* doctrine had any application. By giving estates tail to the grandchildren, the Court would defeat the particular intent, which was plainly expressed, without fulfilling any general intent to justify the adoption of the doctrine; *Brudenell v. Elwes*, (h) *Seaward v. Willock*. (i) The Court would give life estates to the first takers, and declare all the other limitations to be void.

Mr. Chandless and Mr. Dumergue, for the trustees.

June 19.—The VICE-CHANCELLOR, after stating the terms of the devise of the freehold estate:—

Then follows the gift of the leasehold estate, the limitations of which, so far as relates to the successive legatees, do not differ from the limitations of the freehold estate: but as to the ultimate disposition, it is given to the ultimate takers absolutely, instead of being given to them in tail. It is not necessary to advert to any other clauses in the will for the purpose of stating the grounds of my judgment.

The will was dated on the 15th of July, 1831. I think the date immaterial, although it was a fact upon which part of the argument at the bar was founded. The testator died on the 17th of September, 1831. The present bill was filed in the year 1841. The plaintiffs are the youngest children of Elizabeth Juliette Williams, who was a daughter of the testator. The de-

(a) 7 East, 269.

(d) 5 Beav. 77

(g) 1 Coll. 44.

(b) Pollerf. 26.

(e) 2 Keen, 54.

(h) 7 Ves. 381.

(c) Id. 38.

(f) Ubi sup.

(i) 5 East, 198.

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cree of the Court, *made in January, 1844, merely di- [*249]
rected the Master to ascertain the persons who were in-
terested,—the children and grandchildren of the testator, and
their representatives. It did not direct any account to be taken
of the estate, and a doubt occurred to me whether, until the ac-
counts were taken, I could make any decree. It appears to me,
however, in the present state of the case, that I must to some ex-
tent make a declaration now, for if the children of the testator
be right in what they contend for, viz. that they are tenants in tail
of the freehold estate, and absolute owners of the leasehold, then
the plaintiffs would have no interest, at least as to the matters of
the account. If that were so, the account may be waived, and
some of the proceedings in the cause, which would be otherwise
necessary, may be obviated. So far therefore, as it is necessary
to make a declaration, I must explain the view which I take of
the rights of the parties.

According to the Master's report, it appears that the testator
had seven children, three sons and four daughters, all of whom
survived him.

The plaintiffs, who are children of a deceased daughter, and
grandchildren of the testator, claim their mother's share of the
estate until the death of the survivor of the testator's children,
and they claim also to be tenants in common in tail with the
other grandchildren of the testator. The children of the testator,
two of whom are still living, insist that they are to be considered
as tenants in tail, and the heir-at-law claims the real estate, on
the ground that the *cy pres* doctrine will not apply to deprive
him of it.

Now, upon some parts of the case I am prepared to express
my opinion without hesitation. I am clear that the word
"issue" must be read "child or children," in *those parts [*250]
of the will in which the property is given over in case
the testator's children shall die without leaving issue,
and where it is given upon the decease of all the testator's child-
ren (except the eldest) to the lawful issue of such children of the
testator, and other like passages, which were the subject of argu-
ment at the bar; and this conclusion is in no degree affected,

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in my mind, by the consideration that it may be necessary to read the word "issue" in a different sense in another part of the will, in which the property is given over to the right heirs of the testator, upon a total failure of the younger branches of the testator's family. The reasoning in *Sibley v. Perry*(a) appears to me to settle this point; independently of which there are some passages in the will upon which it is impossible to construe the word "issue" otherwise than "children." Thus (for example only) the testator in one place says, "and to this further end and intent, that after the decease of all the lawful issue of my said last-mentioned children, in case the issue of my said last-mentioned children, or any of them, shall leave lawful issue living at the time of the decease of the last survivor of the issue of my said last-mentioned children," then over.

Upon another point I have also as strong an opinion as may be consistent with the respect which is due to the decision of a very eminent judge, with which it possibly may be thought to conflict. I think that, under this will, notwithstanding the decision in *Hayes v. Hayes*,(b) the limitation of the testator's property to the unborn children of the testator's children is not void for remoteness only because it is a gift to persons who might be unborn at the death of the testator.

[*251] *A third point upon which my mind is also made up is this,—that, in considering the validity of the limitations in this will, with reference to the state of the testator's family, the state of the family must be looked at as it existed at the time of the death of the testator, and not as it existed at the date of the will. If a testator should give his property to A. for life, with remainder to such of A's children as should attain twenty-five years of age, and the testator should die, living A., there is no doubt but that the limitations over to the children of A. would be void: *Leake v. Robinson*,(c) but, if in that case A. had died living the testator, and at the death of the testator all the children of A. had attained twenty-five, the class would be then ascertained, and I cannot think it possible that any court of justice

(a) 7 Ves. 522. (b) 4 Russ. 311. Per Sir John Leach, M. R. (c) 2 Mer. 363.

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would exclude them from the benefit of the bequest, on the ground only that if A. had survived the testator, the legacy would have been void, because the class in that state of things could not have been ascertained. I have noticed this point because I find that an intelligent writer (I allude to Mr. Lewis, in his book of *Perpetuities*) has expressed a contrary opinion in his observations on the case of *Vanderplank v. King*,^(a) and has upon that ground doubted the correctness of my decision in that case. In another part of the same book, the cases upon which he founds his opinion are collected and commented upon; but upon examining those cases, it appears to me that none of them (as it is in terms admitted) is inconsistent with the opinion I have expressed. I have considered the point with much attention, and I am clear that the question to be considered is how the family stood at the death of the testator, and not how it stood at any earlier date.^(b)

*Treating these several points as decided, the explanation of the case may be simplified by excluding from consideration that particular disposition in the will which applies to the intermediate enjoyment by the children of any child of the testator (except the survivor of such children,) which child should die leaving children. It is under this gift of the intermediate interest that the plaintiffs now claim; but this exclusion obviously will not affect the point I have now to consider; for until the death of the survivor of the testator's children, there is no gift to his grandchildren, except by way of substitution for the parent of any child (except the eldest) dying, whilst any other child of the testator survives. It will also simplify my explanation if I consider the case in the first instance with reference to the real estate only. [*252]

The case, then, will be reduced, as it appears to me, to a simple point. The case will be the same as if (subject to the two annuities of 200*l.* and 78*l.*) the testator had given his real estate to his trustees to be by them conveyed and assured, so as to give the same to the testator's children (except the eldest child) equally

(a) 3 Hare, 1.

(b) See 3 Hare, 17.

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between them during their lives, with survivorship between them, and after the decease of the survivor of the children, then to the grandchildren (except the children of the eldest son) born and to be born (in like manner,) equally between them during their lives, with survivorship between them; and after the death of the survivor of the grandchildren, then to the testator's great grandchildren (except the great grandchildren by Joseph) born and to be born (in like manner,) equally between them, not however for their lives, but as tenants in common in tail, with cross-remainders in tail between them, with a limitation over [*253] to the right heirs of the *testator in default of issue of all the children of the testator (excepting the eldest son.)

That is, I think, the whole of the case; and upon such limitations I have no difficulty in saying, I adhere to the conclusion I came to in *Vanderplank v. King*, to which, and to the cases there cited (I mean *Humberston v. Humberston*, and the cases of that class,) I refer to avoid repetition; and hold that the children of the testator (except the eldest son took estates for their lives only; and that is all which I must now decide. It is not necessary to the decree, though as part of my present judgment I may add, that, in my view of the case, the grandchildren (except the child of the eldest son) took estates tail general by purchase, as tenants in common in tail, with cross remainders between them in tail, with an ultimate limitation to the right heirs of the testator, failing the estates tail so limited. All that it is necessary now to declare is, first, that the children took life estates only; and, secondly, the interest of the plaintiffs in their mother's share of the rents and profits until the death of the last survivor of the testator's children (except the eldest,) and then direct the accounts, with liberty for the parties to apply at the death of such survivor of the testator's children.

With regard to the personal estate, the effect of the will as to the rents and profits of that part of the property will be the same until the death of the last survivor of the younger children of the testator. The accounts of the estate will be taken with these declarations, and it does not appear to me necessary at present to go farther into the case.

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*The case was spoken to on the minutes of the decree, [*254] in which, after declaring the will established, directing the accounts to be taken, and declaring that (subject to the annuities) the testator's six younger children were entitled to the rents and profits of the freehold and leasehold estates for their respective lives, and the life of the survivor of them, with the benefit of survivorship upon the death of any of them without leaving children, and that the plaintiff and the other child of the deceased daughter were jointly entitled, until the death of the last survivor of the same six younger children, to their mother's share of the same rents and profits, the Court was asked to insert the following declarations :—

Declare, that in the settlement to be executed in pursuance of the said will, the said freehold estates ought, after the decease of the last survivor of the testator's said six younger children, to be limited to or in trust for the several grandchildren of the said testator, born or to be born of the testator's said six younger children, who are by the said will directed to take for the term of their respective natural lives, and to the heirs of the respective bodies of such grandchildren in strict settlement, with cross remainders between them, according to the course of law; such limitations to the said grandchildren and the heirs of their respective bodies, to be to them as tenants in common per capita, and not per stirpes; and with an ultimate limitation, in default of such issue, to the testator's own right heirs. And declare, that in the settlement to be executed as aforesaid, the said leasehold estates ought, after the decease of the last survivor of the testator's said six younger children, to be limited absolutely, for the remainder of the testator's estate and interest therein, in trust for the same aforesaid several grandchildren of the testator, born and to be born of the testator's said six younger children, such grandchildren to take per capita as tenants in common.

5th July.—VICE-CHANCELLOR:—I have referred to the order in *Humberston v. Humberston*,^(a) *Bankes v. The Baroness Le Despencer*,^(b) and **Trevor v. Trevor*.^(c) With regard [*255] to *Humberston v. Humberston*, it appears the Lord Chancellor went fully into the law of the case, and in giving his judgment he said, that all persons living at the death of the testator in that case were to take life estates only, and those that were born afterwards were to take estates tail. He fully explain-

(a) Ubi supra.

(b) See 11 Sim. 508.

(c) See 13 Sim. 113.

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ed his views upon the subject; but when he came to make an order, the order was, "that the Master should see a settlement made of the said trust estate, pursuant to the said will and limitations, to the several persons named to be tenants for life under the said will, and to the heirs male of their bodies in strict settlement, according to the course of law; and if any of the parties who are made tenants for life have any issue male then living, their names are to be inserted in the said deed of settlement." The order went no further. In *Banks v. The Baroness Le Despencer*, the question was, whether the whole direction was not void, or whether the Court would execute it: that was the point argued. The Vice-Chancellor did not give a short answer, simply saying that he would carry it into effect; but he stated his view of the case, with his reasons very fully, and having given that explanation to the parties, he directed "that the Master was to approve of a proper settlement to be made of the estates comprised in a certain deed, upon the uses and trusts, and according to the directions expressed concerning the same in and by the said deed, and to state the same to the Court." In *Trevor v. Trevor*, after explaining the view of the Court, the reference was "for the Master to approve of a proper settlement in pursuance of the will and codicils," &c.

It appears by these cases, that, although it has been usual for the Court to explain its views of the case before
 [*256] *it, to justify the judgment, the Court does not do more than refer the preparation of the instrument to the Master. That is, in strictness, the proper way of dealing with the case, for it is evident that I cannot make a perfect declaration. The Master knowing the view of the Court, will, to a certain extent, carry it out, and the settlement being so far prepared by the Master, the parties are enabled to come again before the Court and perfect the settlement, without the embarrassment which might possibly arise from prospective declarations.

I have no objection in this case to a declaration that the children of the testator took life estates in conformity with my deci-

 1846.—Hammon v. Sedgwick.

sion, and then refer it to the Master to approve of a settlement, in which he will of course have regard to that declaration.(a)

HAMMON v. SEDGWICK.

1846: 19th and 20th November.

A. accepted a bill of exchange for 150*l.* drawn by and for the accommodation of B.

B. indorsed the bill, and then, in order to facilitate its being discounted, procured C. to indorse it. B. subsequently, and before it became due, delivered the bill to a person who advanced him 100*l.* upon it. When the bill became due the holder demanded payment of the 100*l.* from C., and C. some weeks afterwards took up the bill by giving the holder a new bill of exchange for 160*l.*, and the holder then paid him a further sum of 50*l.*, in addition to the 100*l.* he had formerly paid to B. C. brought his action against A. upon the bill, and B. filed his bill to restrain the action, and have the bill delivered up. The common injunction was obtained, but was dissolved on the merits, and C. recovered judgment in the action. At the hearing the bill was dismissed for want of equity, with costs.

THE plaintiff accepted a bill of exchange for 150*l.*, drawn by Edward Sedgwick, dated the 16th of September, 1843, and made payable three months after date. E. Sedgwick requested the defendant, John Sedgwick, his brother, to indorse the bill, in order that he might *the better procure it to [*257] be discounted, and the defendant accordingly added his name, as the second indorser, E. Sedgwick being the first. After such indorsement, and before the bill had become due, it was handed over to Fagg, who advanced E. Sedgwick 100*l.* upon it. The bill not being paid when it became due, Fagg applied to E. Sedgwick, as the drawer and first indorser, and to the defendant, as the second indorser, to take it up; and on the 11th of January, 1844, the defendant gave Fagg another bill of exchange, payable at three months from that date, for 160*l.*, and Fagg delivered up to the defendant the bill for 150*l.*, and paid him 50*l.*, making,

(a) See *Blakesley v. Whieldon*, 1 Hare, 183, where it was ordered that a particular clause should be inserted in a purchase-deed to be settled by the Master.

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with the 100*l.* advanced to E. Sedgwick, and 10*l.* discount, the consideration for the new bill. Fagg afterwards died, and in December, 1844, the defendant paid his administrator the 160*l.* The defendant brought his action against the plaintiff, upon the bill, in June, 1844.

The suit was instituted in July, 1844, for an injunction to restrain the action, and for delivery up of the bill for 150*l.*, to be cancelled. The plaintiff alleged that he accepted it partly for the purpose of paying a debt which was owing by himself and E. Sedgwick to a third party, by whom it was intended that the bill should be discounted; and as to the remainder of the amount for the accommodation of E. Sedgwick; and upon the agreement that E. Sedgwick would provide for the payment of the bill when it became due: that the debt was not paid, the party to whom it was owing having refused to discount the bill: that he (the plaintiff) had received no consideration for the bill from E. Sedgwick, or from the defendant, and that such facts had been known to the defendant before he took the bill. He submitted, [*258] also, that as the bill had become *payable on the 19th of December, and had not come into the hands of the defendant until the 11th of January, the defendant had taken the bill subject to all the equities attaching upon it in the hands of the party to whom it was delivered.

The defendant by his answer, denied that he had any notice of the absence of consideration as between the plaintiff and E. Sedgwick; and he denied that in fact there had been any such want of consideration, for he alleged, and gave evidence to prove, that the plaintiff was indebted to E. Sedgwick in more than the sum of 150*l.*, for business done by the latter as the plaintiff's attorney. The defendant also alleged, and gave evidence to prove, that, besides the amount of the bill for 160*l.* which he had paid to Fagg, he had, in September 1843, advanced to E. Sedgwick the sum of 81*l.*; and he insisted, therefore, that he was indorsee for value of the bill of exchange in question.

The common injunction restraining the action upon the bill was obtained, and was dissolved upon the answer, after argument.

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The defendant recovered in the action upon the bill. On the hearing of the cause,

Mr. Wood and Mr. Glasse, for the plaintiff.—The defendant did not become the holder of the bill until after it became due, and he must therefore be bound by all the equities which existed between the drawer and the acceptor; and the plaintiff had accepted the bill upon the agreement that it should be paid by E. Sedgwick when it arrived at maturity. It was admitted by the defendant that he had not advanced any money on account of the bill until after the time that it became due. He was in the situation of a party who had taken *up a bill [*259] for the honor of the drawer, which gave him no right against the acceptor. *Ex parte Lambert.*(a) It was not enough for him to say that he had indorsed and made himself liable upon the bill. The indorsement gave him no title to sue upon the bill. The question was when he had become the holder: *Mars-ton v. Allen,*(b) *Adams v. Jones.*(c) Upon his own statement the plaintiff had not advanced more than 110*l.* upon the bill; and even if the circumstances of the case were matter of defence at law, the case was one in which the plaintiff was entitled to the aid of the Court to obtain a discovery of the circumstances, and to have the bill of exchange delivered up. The fact that the defendant had recovered in his action at law, since the institution of the suit, was no objection to the relief; nor did it render a supplemental bill necessary: *Massey v. Davies.*(d)

Mr. Romilly and Mr. Cooke, for the defendant.—There is no distinction in this case between the legal and equitable rights of the parties. The injunction was dissolved by the Vice-Chancellor of England, and the case has since been tried at law, and the defendant has recovered the amount of the bill. Equity does not interpose to decree the delivery up of a bill of exchange upon which a party has recovered at law: *Threlfall v. Lunt.*(e) Every

(a) 13 Ves. 179.

(b) 8 M. & W. 494.

(c) 12 Ad. & E. 455.

(d) 2 Ves. jun. 317.

(e) 7 Sim. 627.

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defence which the plaintiff can allege in this court, he might have insisted upon at law: *Harrison v. Nettleship*,^(a) *Clarke v. Manning*.^(b) Where there are no equitable rights, independent of or controlling the legal rights of the parties in the substance [*260] *of the matter in dispute, the jurisdiction cannot be translated by the introduction of a prayer that the instrument on which the right depends may be delivered up to be cancelled: *Corporation of Arundel v. Holmes*.^(c)

The VICE-CHANCELLOR said, that, as he understood the meaning of an accommodation bill, (which the plaintiff alleged this to have been,) it was an instrument which it was intended the party for whose benefit it was accepted, should be enabled to carry into the market for the purpose of raising money. If another person added his name to the bill without consideration, in order to give it additional credit, the acceptor was liable as well to such other person, as to any person by whom money might be advanced upon it. In that respect he could discover no difference in the case, as to the liability of the acceptor, whether the money was obtained upon the joint credit of the drawer and acceptor, or upon that of the drawer, acceptor, and indorser. Nor was it material for the purpose of this suit, whether the amount advanced upon the bill was greater or less; it was a matter into which the court of law would have entered. There was no question of liability raised by the pleadings in the cause which might not have been tried at law. If it were true that the plaintiff could not prove the facts of the case except by means of the defendant's answer, that might be a reason for filing a bill of discovery, but it was no ground for relief.

Bill dismissed with costs.

(a) 2 Myl. & K. 423.

(b) 7 Beav. 162.

(c) 4 Beav. 325.

1847.—Parsons v. Middleton.

*PARSONS v. MIDDLETON.

[*261]

1847: 11th and 12th March.

An order signed by A., addressed to his bankers, directing them, out of the balance due to him on the final arrangement of his account, to pay to B. a certain sum, and which order was forthwith placed in the hands of B., who, accompanied by A., immediately proceeded to the banking house, and delivered it to the bankers: *Held*, to be an instrument requiring a bill stamp within the statute 55 Geo. 3, c. 184.

Held, also, that although the intention of A. and B. was that the order should be forthwith delivered to the bankers, yet the fact that the order was, according to the agreement, delivered by A. to B. (the payee,) brought it within the provisions of the Stamp Act, applicable to an instrument of that character.

That the agreement (according to which the order was made) to give B. a lien on the property of A. in the hands of the bankers, consisting of various shares and securities on which the bankers had a prior charge for the amount of the advances made by them to A., could not be established as separate from and independent of the order, treating the order merely as a notice of the agreement given to the bankers, but that the agreement must be regarded as giving B. only such a lien (if any) as the order created.

THE defendant, Middleton, being, on the 27th of February, 1844, indebted to the plaintiff in the sum of 1977*l.*, payment of which was demanded, proposed to give the plaintiff a charge or lien on shares in various railways, and other securities and property which had been deposited with the defendants, Moss & Co., bankers, of Liverpool, and were subject to a prior charge in their favor. The defendant, Middleton, then wrote and signed a document upon unstamped paper in the following words:—"27th February, 1844. Messrs. Moss & Co. Gentlemen,—Out of any balance which may be due to me after final arrangement of the account, I will thank you to pay to George Parsons, Esq. 1977*l.* I remain your obedient servant, John Middleton."—This document upon being signed, was delivered to the plaintiff, and thereupon the plaintiff and defendant, accompanied by a clerk of the plaintiff, went to the banking-house of Moss & Co., and had an interview with the defendant, Thomas Moss, one of the partners, at which interview the plaintiff presented the document to Thomas Moss, and after a conversation as to the purport of which

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there was some dispute, the document was left with Thomas Moss, and remained in his possession.

On the 9th of June, 1845, the plaintiffs sent to the defendants, Moss & Co., this notice:—"I, the undersigned G. Parsons, do hereby give you notice to pay to me all such principal [*262] money and interest as have been, or are, *or may hereafter be in your possession applicable under and by virtue of a certain order or assignment in writing in my favor, bearing date on or about the 27th of February, 1844, made and given by and under the hand of Mr. J. Middleton, whereby he did desire, order, or direct you to pay to me the sum of 1977*L*, or thereabouts, out of any balance of moneys which might be due from you to the said J. Middleton after realizing the securities in your hands; and which written order or assignment was delivered by me to you on or about the day when it bears date, and was accepted and assented to by you. 8th June, 1845.

GEO. PARSONS."

The plaintiff filed his bill in March, 1845, against Moss & Co., and against Middleton. The bill (as amended) alleged that, on the 27th of February, 1844, it was agreed between the plaintiff and the defendant, Middleton, that the plaintiff should have a charge on the securities in the hands of Moss & Co., for his debt, and that *after* the agreement had been made and concluded, Middleton wrote and signed the order; and that immediately the agreement was made and concluded between the plaintiff and Middleton, they proceeded to the banking house of Moss & Co., and the defendant, Thomas Moss on behalf of the firm, agreed with the plaintiff to hold the said securities, (subject to the payment of what was then due from Middleton to the bank,) as a security for the amount due from Middleton to the plaintiff, and that thereupon the said order or direction was delivered to the defendant, Thomas Moss, on behalf of his firm, as an authority for the firm to pay the said sum to the plaintiff pursuant to the agreement. The bill charged that the plaintiff's lien on the said securities was in no way dependent on the validity of the unstamped order, and that the lien was good, even if the or-

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der were void or invalid; but the bill charged, that *although in fact the order was in the plaintiff's hands [*263] after it was signed, and before it was delivered to Moss & Co., yet that it was written and signed with the intention of being forthwith delivered by Middleton to Moss & Co., and that the order was delivered by the plaintiff to Moss & Co. in the presence of Middleton, and with his privity and consent, a few minutes after it was so written and signed; and that it was not delivered to the plaintiff as the payee within the intent and meaning of the Stamp Act.^(a) The bill charged that Moss & Co. were trustees of the said securities for the plaintiff, subject to the payment of the balance due to themselves. The bill prayed an account of the securities in the hands of the defendants, Moss & Co., and of the moneys realized from those already disposed of, and that, after satisfaction of the debt due on the 27th of February, 1844, from Middleton to Moss & Co., the surplus might be applied, so far as should be necessary, in payment of the plaintiff's debt.

The defendants, by their several answers, admitting the signature and delivery of the order, submitted that it was a bill, or draft, or order for the payment of a sum of money out of a particular fund which might or might not be available, and was delivered to the payee thereof within the meaning of the act; and that, for want of a proper stamp, the order was absolutely void at law and in equity. The defendants Moss & Co. submitted to the Court whether the securities had, as against them, been ever assigned or appropriated to the use of the plaintiff, or whether they were not, at all events, entitled to retain out of the proceeds of the securities the amount of all their advances and interest, not only up to the 27th of February, 1844, but up to the time the *account was finally closed. The defendants [*264] Moss & Co. admitted a balance of 1337*l.* 13*s.* 10*d.* to be in their hands, after satisfying their own claim. By their answers to amendments in the bill, all the defendants denied the existence of any agreement independent of the unstamped order, for charging the securities with the plaintiff's debt. The defendant Thomas Moss said, that, when the order was delivered to him

(a) 55 Geo. 3, c. 184.

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whose favor the order was made happened to be the bearer. It would be a surprise on the party to construe that as a delivery to the payee: *Hutchinson v. Heyworth*,^(a) *Jones v. Simpson*,^(b) *Barlow v. Broadhurst*,^(c) [The third question did not call for determination.]

Mr. Wood and Mr. Chandless, for the defendant Middleton, relied on the objection to the suit founded upon the Stamp Act, and cited *Smith v. Henley*,^(d) *Firbank v. Bell*,^(e) *Butts v. Swann*,^(f) *Lord Braybrooke v. Meredith*,^(g) *Emly v. Collins*.^(h) An agreement which appeared to have been in writing could not be proved by parol: *Brewer v. Palmer*.⁽ⁱ⁾ The distinction between this case and *Walker v. Rostron*, and *Hutchinson v. Heyworth*, was, that in the two latter cases the order was delivered, not to the payee, but to the stakeholder. Here the order had been delivered directly to the payee, and the Court would not introduce any distinction as to the time it was intended to be retained by him, or how he was to dispose of it.

Mr. Bacon and Mr. R. Palmer, for the defendants Moss & Co., insisted on the like ground of defence. The circumstance that the transaction might amount to an equitable contract for a lien, did not obviate the necessity that the instrument by which the contract was to be carried into effect should be properly stamped. The bankers could not have accepted the bill or order without subjecting themselves to a penalty under the Stamp Act (s. 11.) They referred also to Bayley on Bills, pp. 190, 192.

Mr. Romilly, in reply, submitted that the Court would construe the words of the Stamp Act in their ordinary sense; and the instrument in question was not a "bill, draft, or order," in the common meaning of those words: *Blandy v. Herbert*,^(k)—He mentioned also *Huddleston v. Briscoe*,^(l) and *Malcolm v. Scott*.^(m)

(a) 9 Ad. & Ell. 375.

(d) 1 Phil. 391.

(g) 13 Sim. 271.

(k) 9 B. & C. 396.

(b) 2 B. & C. 318.

(e) 1 B. & A. 36.

(h) 6 M. & Sel. 144.

(l) 11 Ves. 583.

(c) 4 B. Moore, 471.

(f) 2 Bro. & B. 78.

(i) 3 Esp. 213.

(m) 3 Hare, 39.

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VICE-CHANCELLOR :—Before the plaintiff can be entitled to relief against Messrs. Moss & Co., it is necessary to prove the fact *that Middleton gave the plaintiff such right, [*268] charging for his benefit the property in the hands of Moss & Co. If the unstamped order be excluded, it is clear that no agreement creating a lien upon the property has been proved as against Moss & Co., for the answer of Middleton cannot be read against the other defendants. If, therefore, the case had been made out as against Middleton, it would still fail against Moss & Co. (except as to the 1337*l.* 13*s.* 10*d.*,) unless the Court were to give the plaintiff the indulgence of directing an inquiry as to that part of the case. But how does the case stand as against Middleton, with reference to the question whether the Court should give the plaintiff the indulgence of perfecting his case as against the other parties? The proof of the agreement is imperfect as against Middleton. The bill charges, indeed, that the plaintiff and Middleton entered into an agreement with respect to the lien, and that, subsequently, Middleton gave the plaintiff an order which was separate from, and independent of, the agreement. But the admission in the answer to the original bill, which must be read with reference to the state in which the record then was, admits nothing more than this,—that Middleton stated to the plaintiff that he had no means of paying the debt, but said that his bankers had in their hands securities belonging to him, and thereupon he gave him the order in question. The conclusion from that statement would rather be that Middleton agreed to give the plaintiff the lien by means of the order. I could not, in such a case, hold, even as against Middleton, that any agreement had been established independent of the order, without at least giving him the opportunity of showing, upon an inquiry, what was, in fact, the nature of the agreement. Excluding the order, therefore, the case of the plaintiff must fail.

With respect to the form of the order, there is no *question. In terms, it is a direction to pay a sum certain out of a precarious fund; and assuming that it was delivered to the payee,—as in fact it was,—I have no doubt that the Stamp Act applies to the case, and that this instrument

 1847.—*Baker v. Baker.*

requires to be stamped. It was, however, said, that, according to the agreement by which the lien was to be made effectual, the order should have been delivered to the bankers by Middleton himself, and not by Parsons. If that had been the actual agreement, the case would have fallen within the authority of *Walker v. Rostron*.^(a) I think, however, that the agreement was to give such a lien on the property as the order would create, and not any different lien; and the order being unstamped, the suit cannot be sustained.

Bill dismissed, with costs as against Moss & Co., and without costs as against Middleton.

 BAKER v. BAKER.

1847: 5th and 7th July.

On construing an appointment of stock in these words, "unto and among my said brother and my sisters and my nephews and nieces living at the decease of my wife in equal shares and proportions," it was held, that the qualifications of living at the death of the wife attached only to the nephews and nieces,—the last antecedent.

The direction as to the shares and proportions in which the legatees are to take the property does not affect the construction of the words which describe the persons who are to take.

The legatees took per capita.

SIR THOMAS BERNARD, by his will dated in 1817, devised certain real estates to his brother, Scrope Bernard Morland; and as to a sum of 20,000*l.* Consols, and a sum of 10,000*l.* 4*l.* [*270] per cent. Annuities, vested in *the trustees of his marriage settlement, upon trust, after the decease of his wife, to transfer the same as he should direct, he directed as follows:—"I do hereby direct and appoint, will and declare that the [trustees] do and shall, immediately after the decease of my said wife (she having survived me,) transfer and make over the said two

(a) 9 M. & W. 411.

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sums of 20,000*l.* and 10,000*l.*, and other the trust premises, to the persons and in the proportions following, viz. to my nephew, the Reverend James Baker, one fourth part of the said two sums and trust premises; to my nephew, Thomas Tyringham Bernard, one other fourth part of the said two sums and trust premises; and as to the remaining moiety of the said two sums and trust premises, do transfer and make over the same, or pay such clear sum or sums of money as shall arise or be produced from the sale thereof, unto, between, and among my said brother and my sisters and my nephews and nieces living at the time of the decease of my said wife, in equal shares and proportions."

The wife survived the testator and the brother and sisters. The principal question of construction was, whether the qualification of being alive at the time of the widow's death was attached to all the legatees, or to the sisters, nephews, and nieces, or the nephews and nieces exclusively. It was also questioned whether the legatees took in classes, one share for each class, or whether they took per capita.

Mr. Romilly, Mr. Wood, Mr. Rolt, Mr. P. White, Mr. R. Palmer, Mr. Wickens, Mr. Erskine, and Mr. Darnell, appeared for the different parties. The following cases were cited, on the question to whom the qualification of *survivorship at- [*271] tached: *Lugar v. Harman*, (a) *Doe d. Hayter v. Joinville*, (b) *Trail v. Kibblewhite*, (c) *Beck v. Burn*, (d) and as authorities that the legatees in such a case took per capita, *Blackler v. Webb*, (e) *Weld v. Bradbury*, (f) and *Dowding v. Smith*. (g) In support of the contrary proposition, *Brett v. Horton*. (h)

VICE-CHANCELLOR:—The sole question to which the facts of the case give rise is, whether the words "living at the time of the decease of my wife," refer to all the persons (his brother, his sisters, and his nephews and nieces) to whom the last moiety of

(a) 1 Cox. 250.

(b) 3 East, 172.

(c) 12 Sim. 5.

(d) 7 Beav. 492.

(e) 2 P. Wms. 383.

(f) 2 Vern. 705.

(g) 3 Beav. 541.

(h) 4 Beav. 239.

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the 20,000*l.* and 10,000*l.* is given, or whether those words refer only to his nephews and nieces. I have referred to all the cases cited during the argument. They all recognize and confirm the principle, that, in the absence of something in the context, or in the circumstances of the case, to exclude the natural import of the testator's words, I am bound to give them their natural effect. It is admitted that there is not in this case anything in the context or in the circumstances to justify me in departing from the natural meaning of the words of the will.[1] Beyond this the cases do not appear to me to throw any light upon the question.

My opinion is, that the words "living," &c. are in their application confined to nephews and nieces. If, indeed, the [*272] bequest of the moiety of the two sums had *been to "my brother, sisters, nephews, and nieces living," &c., or to "my brother and my sisters, and my nephews and my nieces living," &c., it might have been impossible to read the description of the objects of the testator's bounty without applying the qualification "living," &c. to all,—but the circumstance that one brother only is the object of the testator's bounty quoad the moiety, and that the nephews and nieces are described as one class, leads my mind irresistibly to the conclusion, that the qualifying words do not apply to the one brother, or to any but the last antecedent,—the nephews and nieces, with which they are immediately connected.

Ingenious arguments were founded upon the place in which the words "in equal shares and proportions" are found; but I do not think that affects the construction. The testator describes the persons who are to take, and then states in what proportions they are to take, and the words, "living at the time of the decease

[1] A testator is always presumed to use the words, in which he expresses himself, according to their strict acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense in which he appears to have used them will be the sense in which they will be construed. *Tillinghast's ex'r. v. Cook*, 9 Metc. 149; *Royle v. Hamilton*, 4 Ves. 437; *Cromer v. Pinckney*, 3 Barbour's Ch. R. 466; *Hone v. Van Schaick*, 3 Ibid. 488; *Collins v. Hozie*, 9 Paige's Ch. R. 81; *Baker et al. v. Atlas Bank*, 9 Metc. 197.

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of my wife," are part of the description, whether applied to all the objects or to nephews and nieces only.

The legatees take per capita.

***THE MASTER OR KEEPER, FELLOWS AND SCHOLARS [*273]
OF CLARE HALL v. HARDING.**

1848: 13th, 14th, 15th, and 21st January.

To a bill which alleged (amongst other things) that the plaintiffs, believing themselves to be entitled under a devise to a dwelling-house and shop, entered into an agreement for a lease of the premises, then in a dilapidated state, to a tenant, in pursuance of which the tenant expended money in pulling down and rebuilding the premises,—that the defendant, who was, as it afterwards appeared, the actual owner of a moiety of the property, knew the true state of the title, and had made a claim to the whole property, which claim he repeated a few days before the improvements were commenced,—that he knew also that the improvements were being made, and that the plaintiffs and their tenant were acting under a mistake, and, nevertheless, permitted the works to be carried on without any objection during their progress,—and praying that the defendant might be decreed to confirm the lease, and in the meantime be restrained from evicting the tenant;—a demurrer for want of equity was allowed.

Held, also, that in such a case the principle is the same whether the owner and the party making the expenditure by mistake are strangers, or tenants in common of the property.

That the owner having once and recently given notice of his claim to the property was not, in order to exclude any equity in respect of the expenditure on the ground of mistake by the party in possession, or of acquiescence on his own part, bound again to assert it when the expenditure began, or while it was going on.

That, in order to exclude such equity it was not necessary that the notice of his claim, given by the claimant to the party in possession, should disclose any particulars relating to his title; nor, if the claim which he made exceeded what he was entitled to, was the party in possession justified in disregarding it, or supposing it to be unfounded.

Although the Court will, by decree, restrain the setting up of an outstanding term to prevent the fair trial of a legal right, yet, after the trial of an ejectment has taken place, and a term has been set up whereby the trial of the merits of the case was prevented, and the party using it obtained a verdict and judgment, a suit cannot be sustained to set that judgment aside; nor will the fact, that the communications made before the trial by the party, who so gained the advantage at law, led the other party to believe that the substantial question of the title

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would be tried in the ejectment, enable him to sustain a suit for such a purpose ; but if there be any impediment to the trial of the legal right in another action of ejectment, a suit may be sustained for relief by removing that impediment to the trial of the right in such future action.

THE bill, which was filed in December, 1847, against Henry Harding and William Rowntree, stated that Mark Anthony Stephenson, formerly a fellow of Clare Hall, was, at the time of making his will, and of his death, seised in fee-simple of a dwelling-house and shop in Newborough-street, Scarborough, and that, by his will dated in March, 1790, he devised and bequeathed his real and personal estate to trustees, their heirs, executors, &c., upon trust during the lives of his sister, Mary Bowes, and his cousin, Lacy Harding, to repair and uphold all his houses and buildings, and subject to such trust he devised and bequeathed all his real and personal estate to the said Mary Bowes for her life, [*274] remainder *unto the said Lacy Harding for his life, and from and after the decease of the survivor of them, the said Mary Bowes and Lacy Harding, he directed his trustees to convey and transfer all his said real and personal estates to the Master and Fellows of Clare Hall, upon trust for the foundation and endowment of one or more scholarships for the benefit of natives of Scarborough ; that the testator died on the 24th of March, 1790, and his will was proved by his executors, and a memorial of the probate copy registered in the office for the registry of deeds, &c. in the North Riding of Yorkshire, pursuant to the stat. 8 Geo. 2, on the 15th of July, 1791.

The bill stated that Mary Bowes died on the 16th of June, 1790, and that Lacy Harding having, in 1818, become an inmate of the York Lunatic Asylum, the premises in Newborough-street were let and managed by Mary Harding, his mother, and the defendant, Henry Harding, who was a younger brother of Lacy Harding ; that Mary Harding, the mother, died at sometime before the year 1825, and that thenceforward the premises were let and managed by the defendant, Henry Harding, alone: that Lacy Harding died on the 17th of December, 1843 : that the plaintiffs were not informed of his death until the month of February, 1845 ; and shortly afterwards a correspondence was opened be-

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tween the solicitors of the plaintiffs and William Rowntree, the tenant of the premises in Newborough-street, which, according to the result of the inquiries which had formerly been made on behalf of the College, and also according to the general belief in the neighbourhood, had descended to the testator as heir-at-law of his father, and passed under the general devise by the testator to the College: that the heir-at-law of the survivor of the trustees conveyed to the College all his interest in the real estate of the testator, and the tenant of the premises in Newborough-street *attorned to the College, and paid his rent in ar- [*275] rear; that after this had been done, a claim to the property in Newborough-street was made by the defendant, Henry Harding, whose solicitors applied to the tenants of the property as follows:—"July 4th, 1846. We are instructed by Mr. Henry Harding to apply to you for immediate payment of the two years' rent due April last for the shop, &c. in your occupation. We should regret the necessity of having to take any legal measures to enforce payment, but we shall be compelled to do so if the amount due be not forthwith paid:" that this letter the solicitor of the College answered:—"9th July, 1846. Your letter addressed to Messrs. Stickney and Rowntree, demanding rent of premises in their occupation on behalf of Mr. Henry Harding, has been sent by them to Dr. Webb, the Master of Clare Hall. The property, it appears is part of the estate of the late Rev. Mark Anthony Stephenson, which the College claim to be the owners of under his will. We lately corresponded with you on the subject, requesting you to act as the local agents of the College in the receipt of the rents. We infer from your letter to the tenants that your client sets up an adverse claim to these estates, and if so, we shall feel obliged by your stating to us, for the information of the College, the grounds of such claim. We trust you will take no unpleasant steps against the tenants, but if the right of the College is to be contested, we will do what is necessary to assert the same. We shall feel obliged by an early reply:" that the solicitors of Harding replied as follows:—"31st July, 1846. We beg to inform you that the house, &c. occupied by Messrs. Stickney and Rowntree appears to have been treated for a number of

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years as the property of Mr. Henry Harding, and not of his late brother Lacy Harding, and we cannot make out that it was ever the property of the Rev. Mark Anthony Stephenson, [*276] *through whom the College claims. Mr. Harding seems confident this property is his own, and he will expect the rent to be paid. If you can show us in any way that this house, &c. were the property of the late Mr. Stephenson at the time of his death, the matter may be easily settled. In the meantime we must request that the rent be paid :” that on the 11th of August, 1846, the plaintiffs’ solicitors wrote to the solicitors of Harding a letter in which they again expressed their confidence in the title of the College to the property, and stated the substance of the communication which had been made to the College on the subject in the year 1817, by Mr. John Travis (the son of one of the trustees of the testator’s will,) then a solicitor practising at Scarborough : that the solicitors of Henry Harding replied on the 18th of August, 1846 : “ We have consulted our client on the subject of your letter, and if you can show to us any title in the late Mr. Stephenson at the time of his death, in his own right, in the houses you allude to, there will be no difficulty about managing the matter ; but if this should be declined, the question must be tried at law, as our client is determined not to give up any portion of the property until he is satisfied the College is entitled to it. Waiting your reply, we are, &c.”

The bill stated that the premises in Newborough-steeet were then in a very dilapidated condition, and of very little value, and that the most beneficial mode of dealing with the property was to demise the same upon a building lease ; and that, on the 22nd of August, 1846, the plaintiffs, by their land agent, entered into an agreement with the defendant Rowntree, the tenant of the premises, for a lease of the same to him for a term of forty years at a yearly rent of £38, in consideration of the lessee pul- [*277] ling down and rebuilding the premises according *to a certain plan, within three years from the date of the agreement, and the plaintiffs thereby agreed to hold the defendant Rowntree harmless from any other person or persons claiming the said property, and defend any action that might be brought

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against him for any rent or rents paid in respect thereof; in pursuance of this agreement, Rowntree, in the month of October, 1846, caused the old buildings to be pulled down, and proceeded to erect new and substantial buildings in their stead, which were completed in May, 1847, at an expense of 1400*l.*, in addition to 200*l.* expended in fixtures.

The bill stated that when the said new buildings were almost completed, the defendant Henry Harding brought his action of ejectment against the defendant Rowntree, the tenant of the premises in Newborough street, upon whom the declaration in the action was served on the 21st of May, 1847: that the plaintiffs appeared and pleaded the general issue: that on the 1st of July, 1847, the plaintiffs' solicitors received from the attorney of the defendant Harding, the lessor of the plaintiff in the ejectment, a notice that he proposed to adduce in evidence on the trial several documents, and, among others, first, the will of Mary Stephenson proved in the Prerogative Court of Canterbury, 4th December, 1781; third, the will and codicil of Mary Bowes, daughter of Mary Stephenson, proved in the Exchequer Court of York, 23rd of June, 1790; tenth, indenture of lease by the lessor of the plaintiff of the one part, and Isaac Stickney and William Rowntree of the other part, dated 14th April, 1834; and requiring admissions of the said documents on the part of the defendant.

The bill then stated that the plaintiffs, having caused inquiries and examinations to be made, had discovered that the *title of the testator to the Newborough street property [*278] was not derived as heir-at-law of his father, but that the same was derived from Mary Stephenson, his mother, who by her will dated the 9th of December, 1771, devised one moiety of the said premises to her daughter Francis Stephenson, her heirs and assigns for ever, and, devised the other moiety to trustees for the separate use of her daughter Mary Bowes, for her life, with remainder to such uses as the said Mary Bowes should by deed or will appoint, and in default of appointment, over: that the testatrix, Mary Stephenson, died in January, 1781, and her daughter Frances died on the 7th of February, 1790, intestate, leaving the testator her brother and heir-at-law, and that the

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other daughter, Mary Bowes, died on the 11th of June, 1790, having by her will appointed and devised her moiety of the Newborough street property to trustees upon certain trusts, which did not take effect, with remainder to the use of the defendant Henry Harding, his heirs, and assigns.

The bill stated that no memorial of the said will of Mary Stephenson was ever registered pursuant to the stat. 8 Geo. 2, c. 6,(a) and that by such statute it is enacted—that a memorial of all wills and devises in writing, made or to be made and published where the devisor or testator shall die after the 29th of September, 1736, may be registered in such manner as in and by the said statute directed; and that every such devise by will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee, plaintiff or consignee, for or upon valuable consideration, unless a memorial of such will be registered in

such manner as is thereafter directed. That upon [*279] the said action of *ejectment coming on for trial at the Yorkshire Summer Assizes for 1847, the counsel for the plaintiff in the action intimated their intention to give in evidence the said lease of the 14th of April, 1834, by the defendant Henry Harding, the lessor of the plaintiff, to Stickney and Rowntree, and thereupon to insist that Rowntree, and the plaintiffs who defended as his landlords, were estopped at law from disputing the title of the said defendant Henry Harding, inasmuch as the possession under the said tenancy had never been rendered or given up to the said Henry Harding; that the plaintiffs were in fact thereby estopped, and that they were advised to withdraw from the defence of the said action, and according to the practice in such circumstances in ejectment, the nominal plaintiff was nonsuited, and the defendant Henry Harding thereupon became entitled to obtain a rule of Court for issuing a writ of execution for the entirety of the premises. The bill alleged that the defendant Henry Harding had obtained such rule, and threatened forthwith to issue a writ of possession, and to execute the same

(a) An Act for the public Registering of Deeds, &c. affecting Lands, &c. in the North Riding of Yorkshire.

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by turning the defendant Rowntree out of possession of the premises, to his great damage and injury, and the entire obstruction of his business; and that the plaintiffs, under the agreement of the 22nd of August, 1846, were bound to indemnify Rowntree in respect of the title of the defendant Harding, or of any other claimant to the property.

The bill charged that by the setting up of the lease of the 14th of April, 1834, by way of estoppel, on the trial of the ejectment, the defendant Henry Harding had availed himself of a technical advantage to defeat the just and legal rights of the plaintiffs, and their tenant, and had thereby prevented the trial of the respective rights of the parties in the said action; and that the said lease ought not to have been set up or used for such *purpose: that Rowntree was a purchaser of the said [*280] premises for valuable consideration, and that as against him and as against the plaintiffs, who, by reason of the said indemnity, were entitled to the benefit of the same defence, the said devise by the unregistered will of the said Mary Stephenson was fraudulent and void under the said statute.

The bill also charged that the defendant Harding and his solicitors, before and at the time of writing their letters of the 4th of July and 18th of August, and subsequently whilst the transactions hereinafter mentioned were proceeding, well knew the title to the premises in Newborough street, and were well acquainted with the several wills by which the premises were respectively devised, or purporting to devise the same; and in particular, that Harding and his solicitors well knew of the existence of the said will of Mary Stephenson, and the time of her death, and of the respective deaths of her said daughters, and of the said testator, and well knew that the said will of Mary Stephenson had never been registered pursuant to the said statute, and that, in consequence thereof, the same was not likely to be known to the plaintiffs, or their solicitors; and that, from the statements of the plaintiffs' solicitors in the said correspondence, the defendant Harding and his solicitors well knew, as the fact was, that the plaintiffs and their solicitors and agents were wholly ignorant of the existence of the will of Mary Stephenson, and

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of any right or title, or of any fact which might lead them to suppose that there was any right or title to the said premises in the defendant Harding. That the works on the premises in pulling down and erecting new buildings thereon, occupied from the month of October, 1846, until the month of May, 1847, and the defendant Henry Harding and his solicitors were, [*281] during the whole of the progress *of the works, well aware that the said works were going on, and that the said dilapidated buildings were being pulled down, and that a large sum of money was being expended in the erection of other buildings on the said premises, but the defendant Harding did not, nor did his said solicitors give to the plaintiffs or their solicitors or agents, or the said tenant of the premises, any notice or intimation that the defendant Harding claimed any interest in the premises as tenant in common with the plaintiffs under any will or devise of a moiety of the said premises: that after the old buildings had been pulled down, and during the progress of the new buildings, and a short time before the service of the declaration in ejectment, the solicitor of the defendant Harding, in a conversation which occurred between him and Rowntree near the property, said, that he was convinced that if the defendant Henry Harding would go on with his claim he would be entitled to, or recover a half of the property; but neither Harding nor his solicitors, during the whole of the progress of the said works, gave the plaintiffs or their solicitors or agents any reason to believe that Harding persisted in his claim to the entirety of the estate: that in fact the defendant Harding, knowing of the improvements on the said premises, permitted the same to be made at the expense of the defendant Rowntree as aforesaid, without any objection, and without intimating to him or to the plaintiffs that he intended to take proceedings for ejecting and ousting them from the premises, without regard to their expenditure thereon, when the works and buildings should be completed.

The bill charged that the will of Mary Stephenson was a part of the common title of plaintiffs and the defendant Harding, and that the plaintiffs and the defendant Henry Harding had a com-

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mon interest therein, and that he ought to have informed plaintiffs of the devise *by the said will, and ought [*282] not to have concealed or suppressed the same whilst the said works and buildings were going on, but ought to have given the plaintiffs or their agent or tenants notice that as tenant in common of the premises he did not approve of the works and buildings, or did not assent thereto, and would not adopt or confirm the same; and in evidence, that the defendant Harding knew the said title or must have known the same, the plaintiffs charged that during the life of Lacy Harding the defendant Harding accounted for one moiety of the rent of the said premises to the estate of Lacy Harding, and received the other moiety to his own use; that the defendant Harding, knowing his title as aforesaid, acquiesced in the said works and buildings, and permitted the defendant Rowntree to expend a large sum of money thereon as aforesaid, under the agreement of the 22nd of August, 1846, and that the defendant Harding ought not now to evict the defendant Rowntree from the possession of the premises without regard to the said agreement or to the terms thereof, and the demise thereby contracted for; and ought to be restrained, by injunction, from so doing: that the defendant Harding, by the said letters of his solicitors, claiming the entirety of the premises, notwithstanding he was, under the said will of Mary Stephenson, entitled to no more than a moiety thereof, wilfully and designedly misled the plaintiffs and their solicitors and agents in respect of the said title, and thereby the plaintiffs were induced to enter into such agreement as aforesaid, and to indemnify or contract to indemnify the defendant Rowntree, the tenant of said premises, in respect of the same, which plaintiffs would not otherwise have done.

The bill charged that the defendant Harding and his solicitors, before the commencement of the works and buildings, and during the progress thereof, well knew, *or had [*283] good reason to suspect, that the plaintiffs and their solicitors and agents were wholly ignorant of the will of Mary Stephenson, or that the premises were devised thereby; and well knew, as the fact was, that the plaintiffs, and their tenants and

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agents, were acting wholly by mistake and in ignorance of any legal right in the defendant Harding to the said premises, or any part thereof.

The bill prayed an injunction, restraining the defendant Harding from suing out or executing the writ of possession under the ejectment; and that all such directions might be given as should be necessary and proper for the trial of the legal rights of the plaintiffs and defendant Harding in the premises, and that the defendant might be restrained from setting up or giving in evidence on any such trial, by way of estopped, the said lease of the 14th of April, 1834. And in case it should appear that the defendant Harding was entitled at law, by virtue of the devise by the will of Mary Stephenson, to recover one moiety, or any other part of the premises, then that it might be declared that the defendant Harding was, under the circumstances, bound to join and concur with the plaintiffs and all proper parties in executing a good and valid lease or demise of the premises to the defendant Rowntree, in pursuance of and in conformity with the agreement of the 22nd of August, 1846; and that in the meantime the defendant Harding might be restrained by injunction from ousting or evicting the defendant Rowntree from the possession of the premises.

A motion was made for an injunction to restrain the defendant from executing the writ of possession. The motion stood over, the defendant Harding undertaking in the meantime not to disturb the possession of the tenant. Harding then demurred, for want of equity.

[*284] *Mr. Romilly and Mr. Elmsley, in support of the demurrer:—

The bill seeks relief, first, in respect of a legal question; and, secondly, upon an equitable ground. The legal question has a double aspect—1st, with reference to the proceedings at law which have already taken place; 2nd, with reference to any future proceedings at law.—First, what is the equity on which the College can deprive the defendant of the benefit of the verdict which he has already obtained? The defendant claims to be the owner of

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the property in question ; he was in possession of that property, and had demised it to a tenant ; the College, instead of bringing their ejectment as they might have done, induced the tenant to attorn to them, and thus threw upon the defendant the necessity of becoming the plaintiff at law. There was no fiduciary character which precluded the defendant from using all the legal evidence in his power to support his title. Secondly, the defendant having recovered judgment, the College, if they now assert any legal title to the property, can do so by an action of ejectment, in which they do not require the aid of this Court. The lease from the defendant to Stickney and Rowntree would be no objection to the title of the College ; nor is there any other impediment in the way of any legal proceedings the College may be advised to adopt.

As to the equitable ground which is attempted to be made:—The College by their agents had distinct notice of the defendant's claim before they entered into the agreement for the building lease. The provision in that agreement for the indemnity of the lessee shows that the existence of an adverse claim was known and adverted to. The dates of the correspondence, the agreement, and of the erection of the new building, shows that nothing which the defendant had said, or omitted to *say, could have occasioned the expenditure which the [*285] lessee of the College has, under their indemnity, incurred. In order to establish an equity of this kind, the act must have been done under some encouragement from the party against whom the relief is sought: *Dann v. Spurrer*.(a) The defendant Rowntree was, in fact, a lessee from the defendant Harding ; but a lessee cannot by laying out money upon the demised property raise an equity against the lessor, to prevent him from recovering possession of the property : *Attorney-General v. Baliol College*.(b) If circumstances like the present were held to confer upon the plaintiffs the equitable right which they seek, it would illustrate the remark of Lord Clare,(c) that a man may be "improved" out of his estate. On both grounds, therefore, the

(a) 7 Ves. 235.
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(b) 9 Mod. 411.
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(c) 3 Ridg. 519.

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equity fails. Even if Rowntree could sustain the suit, the College has no such right. It is not enough that a party is liable to indemnify another, in respect of the subject of the suit, if he has not been called upon to do so, or has not himself sustained any injury: *Rigby v. Great Western Railway Company*.(a)

Mr. *Rolt* and Mr. *Hare*, for the plaintiffs, in support of the bill.—The bill seeks the aid of the Court, first, as ancillary to the trial of the legal right; and, secondly, upon equitable grounds wholly independent of the legal right. First, the legal right of the defendant Harding to any part of the premises in question, depends upon the effect of the Registry Act for the North Riding;(b) and the question upon the act is whether a purchaser for valuable consideration from the heir-at-law of Mary Stephenson, shall not prevail against a devise of Mary Stephenson, claiming *under an unregistered will.(c) The de- [*286] cision of the House of Lords in *Warburton v. Loveland*(d) and the reasoning of Sir Edward Sugden upon the case, (*Vend. & Pur.*, vol. 2, p. 356, 10th ed.,) are sufficient to show, at least, the probability that Rowntree, as the purchaser from the heir-at-law, has the better title. That is the legal question which the College are entitled to try, and the trial of which, in the ejectment, the defendant Harding prevented, by availing himself of the lease which he had made to Rowntree, the terre-tenant, whose title was then in question, and by which the defendants in the action were estopped from going into the merits of the case. The lease ought not to have been used for the purpose of the estoppel, for two reasons; first, because it was a demise which Harding had either wrongfully made in his own name, when, in fact, he was at the utmost entitled only to a moiety of the property, or, as to which, he was with respect to that moiety in the position of a trustee for the plaintiffs; and, secondly, because such a use of the lease was a surprise upon the College, after the notice of the 1st of July, 1847, by which they were led to believe that the title of the plaintiff in the ejectment would be founded upon the

(a) 2 Phill. 49. See *Gibson v. Ingo*, 6 Hare, 112.

(b) 8 Geo. 2, c. 6.

(c) See Sect. 1.

(d) 2 Dow. & CL 480.

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will of Mary Stephenson. The Court would, therefore, restrain the defendant Harding from using the judgment which he had so recovered, to evict the defendant Rowntree, before the merits of the case could be tried; and also, restrain him from availing himself of the same estoppel in the next trial. The latter relief is within the rule on which this Court restrains the setting up of outstanding terms,^(a) and the former is within the principle thus stated by Lord Redesdale: "As courts of equity will prevent *the unfair use of an advantage in proceeding in [*287] a court of ordinary jurisdiction, gained by fraud or accident, they will also, if the consequences of the advantage have been actually obtained, restore the injured party to his rights."^(b) The Court will not assist a party after verdict, where he has failed at law, owing to any default of his own: *Curtess v. Smalridge*,^(c) *Tovey v. Young*,^(d) *Protheroe v. Forman*,^(e) *Manning v. Maestar*,^(f) *Field v. Beaumont*; ^(g) but where (as here) the party had no opportunity, by any industry or vigilance, of bringing the true case before the court of law, this Court will relieve against a verdict or judgment so obtained: *Hennell v. Kelland*,^(h) *Coldrington v. Webb*,⁽ⁱ⁾ *Countess of Gainsborough v. Gifford*,^(k) *Franklyn v. Thomas*,^(l) *Hankey v. Vernon*.^(m)

Secondly, the other branch of the relief is purely equitable; it assumes the legal question to have been decided in favor of the defendant Harding, and that he and the plaintiffs are tenants in common of the premises in equal moieties. The principle is that on which equity protects a party, who has made improvements or otherwise expended money under a supposed title or right, from being deprived of the benefit of his outlay. One example of this is in the case of a purchaser, 3 Sugd. Vend. and Pur. p. 436, pl. 52, et seq., 10th ed.: *Neesom v. Clarkson*.⁽ⁿ⁾ It is not only in cases where the aid of equity is sought by the legal owner

(a) Redesdale, Tr. on Plead., p. 108, 3d ed.; p. 134, 4th ed.

(b) Redesdale, Tr. on Plead., p. 105, 3d ed.; p. 131, 4th ed.

(c) 1 Eq. Ca. Ab. p. 377, pl. 1. (d) Id. p. 378, pl. 7. (e) 2 Swans. 227, 233.

(f) Cited Ib. 231.

(g) 1 Swans. 207.

(h) 1 Eq. Ca. Ab., p. 377, pl. 2.

(i) Id. pl. 3.

(k) 2 P. Wms. 424.

(l) 3 Meriv. 225.

(m) 2 Cox, 12.

(n) 4 Hare, 97.

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to recover the lands, that this equity is administered, nor [*288] does the case of **Needler v. Wright*(a) appear to be any authority for so restricting the rule. The application of the equitable principle does not depend upon the accident whether a party is plaintiff or defendant: the Court does not give him in the latter character what would be refused to him in the former: *Hanson v. Keating*.(b) The cases are numerous in which a party, having expended money in the improvement of the land of another, has acquired in equity a right to be indemnified or reimbursed or protected in some form, according to the circumstances of the case, in respect of his expenditure. A common form of this relief is the case of part performance of a contract upon which the Court excludes the legal effect of the Statute of Frauds. Another class of cases arises where, without any contract, a party has acquiesced in the outlay upon his land by another: *Huning Ferrers*.(c) *East India Company v. Vincent*.(d) *Jackson v. Cator*.(e) *Dann v. Spurrier*.(f) *Kenney v. Brown*.(g) *Cawdor v. Lewis*.(h) *Pilling v. Armitage*.(i) *Williams v. Earl of Jersey*.(k) *Durham and Sunderland Railway Company v. Wauw*.(l) A third class is where the expenditure has been made by a party in ignorance of a defect in, or an absence of title,—either the outlay, or the title to the lands, or both, being unknown to the legal owner,—and therefore without acquiescence or encouragement on his part. This principle is affirmed by Lord Ellesmere upon great consideration, in the *Earl of Oxford's case*.(m) and was also laid down in the prior case of *Peterson v. Hickman*.(n) and followed in [*289] the *subsequent case of *Edlin v. Battaly*.(o) The circumstances stated in this bill show a stronger case for relief than the cases of the last class. The present case in fact, if it falls in any respect short of distinct acquiescence and encouragement, at least takes an intermediate place between the two last clauses.

(a) Nels. Ch. Rep. 57, cited 3 Sugd. V. & P. p. 437, pl. 55. (b) 4 Hare, 4.

(c) Gilb. Eq. Rep. 85.

(d) 2 Atk. 83.

(e) 5 Vea. 688, 691.

(f) 7 Vea. 235.

(g) 3 Ridg. 518, 529.

(h) 1 Y. & C. 427.

(i) 12 Vea. 85. Per Sir W. Grant.

(k) Cr. & Ph. 91.

(l) 3 Beav. 119; 2 Railway Cases, 395.

(m) 1 Rep. in Chan. 1.

(n) Cited Id. p. 3.

(o) Levinz, (pt. 2,) 152

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The expenditure was made by the defendant Rowntree in rebuilding the premises under the indemnity of the College, owing to a mistake as to their title,—the defendant Harding knowing that the College and their tenant were acting under such mistake,—having the means of correcting that mistake and not doing so, rather promoting the mistake than the contrary, and encouraging the expenditure by his silence during the progress of the works. Equity will not in such a case permit the defendant Harding to evict Rowntree, with whom he is tenant in common, and thereby obtain possession of a moiety of the improvements, without bearing any portion of the expense of making them, but will compel him to take his moiety of the property in the improved state, subject to the agreement for a lease to Rowntree which formed the consideration for those improvements, and join with the College in a demise to Rowntree in conformity with the agreement.

Jan. 21.—VICE-CHANCELLOR:—This case was argued before me on general demurrer for want of equity. The plaintiffs and Henry Harding, the defendant, both claim to be entitled to the entirety of certain property in Newborough street, Scarborough, the subject of contest in this suit, now in the tenure or occupation of the defendant William Rowntree. The plaintiffs *claim under the will of Mark Anthony Stephenson, [*290] who died in 1790, by which will he devised all his real estate to trustees, upon trusts for the plaintiffs in remainder expectant upon certain particular estates, of which a life interest in Lacy Harding (brother of Henry Harding) was the last; and upon this demurrer I must assume that until after the expenditure upon the premises in question by Rowntree, which I shall presently mention, the plaintiffs always supposed that the entirety of the property passed by the will of Mark Anthony Stephenson; and that he had become entitled thereto as heir-at-law of his father. The ground of Henry Harding's claim to the entirety of the premises, does not appear. But, upon this demurrer, I must take it to be true that, under the wills of Frances Stephenson and Mary Bowes, the defendant, Henry Harding, if no-

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thing had occurred to disturb such disposition, was entitled to an undivided moiety of the property, and no more, and that the testator, Mark Anthony Stephenson, if nothing had occurred to disturb the disposition, became entitled to the other undivided moiety thereof as the heir-at-law of Frances Stephenson, and not as the heir of his father. I must also take it to be true, that from the commencement of the proceedings mentioned in the bill, until he recovered the entirety in ejectment at the Summer Assizes, Henry Harding knew of the existence of the wills of Mary Stephenson and Mary Bowes, and that the plaintiffs did not. This would explain the claim of Henry Harding to one moiety of the property. As to his claim to the other moiety, included in his claim to the entirety, it was suggested at the bar that there was property which passed under the wills of Mary Stephenson and Mary Bowes, other than and in addition to that in Newborough street; and that the claim of Henry Harding to the entirety might be explained by supposing, that, since the [*291] death of Mary Bowes, a partition had taken place, and that Henry Harding had thereby become entitled, to the entirety of the property in question in severalty. To which might perhaps be added a suggestion of a conveyance by Mark Anthony Stephenson in his lifetime; but as no such suggestion is to be found in the bill, I can only treat the claim of Henry Harding to more than a moiety of the property as a claim unexplained. All I can say with reference to that suggestion is, that the claim of Henry Harding to the entirety of the property is not necessarily inconsistent with the case made by the bill.

Lacy Harding, the last tenant for life, was of unsound mind, though not found so by inquisition, and, during the last years of his life, he was under the care of Henry Harding, who received the rents and profits of the property in question, and accounted for a moiety thereof to or as the property of Lacy Harding.

On the 14th of April, 1834, during the lifetime of Lacy, Henry Harding granted a lease of the entire property to two persons, named Stickney and Rowntree. Stickney is since dead, and Rowntree is a defendant to this bill. The duration of this lease does not appear. On the 14th of December, 1843, Lacy

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Harding died. Afterwards Stickney and Rowntree treated with Henry Harding for the renewal or extension of the lease; but before any arrangement was come to between Stickney and Rowntree and Henry Harding, Stickney and Rowntree heard of the claim (which they appeared to have treated as the right and title) of the plaintiffs to the property, and applied to them for a lease. A correspondence was then opened between the plaintiffs and Henry Harding through the solicitors of each. In that correspondence each party claimed the entire property. The plaintiffs called upon Henry Harding to explain the *grounds of his claim, which he did not at that moment [*292] think proper to do; but some correspondence passed, pointing at the ground of his title, or of his objection to the plaintiffs' claim. The only expression I can find in that correspondence made by the solicitor of Henry Harding, which can be treated as a representation of the title under which Henry Harding claimed the property, is contained in the statement, that, if the plaintiffs can show that Mark Anthony Stephenson was seised of it at the time of his death, the dispute between the parties may be easily settled. The last letter is dated the 18th of August, 1846. The surviving trustee, or his heir, under the will of Mark Anthony Stephenson, conveyed to the plaintiffs such legal estate in the property as passed under his will; and the question of title merely is, therefore, strictly and properly a legal question.

In that state of things, both parties claimed the rent from Stickney and Rowntree, who elected to treat the plaintiffs as the parties rightfully entitled to the entirety of the property, and not only paid them the rent, but on the 22nd of August 1846, (four days after the last letter written on behalf of Henry Harding,) they came to an agreement in writing with the plaintiffs, by which, in consideration of a forty years' lease, Rowntree agreed to expend money in restoring the premises, and the plaintiffs agreed to indemnify him against the expenses in question, if he should be evicted from the property. Under this agreement, 1600*l.* was expended by Rowntree in building upon the property. Henry Harding was aware that the expenditure

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was going on, but did not object to it, nor caution Rowntree or the plaintiffs against the consequence of such expenditure, except so far as the claim he had made to the entirety of the property, which was made before the expenditure was commenced, (and *which claim was never withdrawn,) was notice that the expenditure was made at the peril of the parties making it.

In May, 1847, Henry Harding commenced an action of ejectment against Rowntree, and some further communication took place between the solicitors of the contending parties, from which the plaintiffs' solicitors drew the conclusion that Henry Harding intended, on the trial of the ejectment, to try the question of title with the plaintiffs. The ejectment came on to be tried at the last Summer Assizes for the county of York when Henry Harding, instead of going into the question of title between himself and the plaintiffs, put in evidence the lease of 1834, which of course put an end to the cause as between himself and Rowntree, and entitled Henry Harding to a verdict. Henry Harding having thus recovered in the action of ejectment, the present bill was filed. [His Honor stated the prayer of the bill.]

I have before stated that a correspondence had taken place between the solicitors of the contending parties, on the subject of Henry Harding's title. The plaintiffs, referring to that correspondence, say, (and upon demurrer I must take it to be true,) that the defendant Henry Harding, by the said letters of his solicitors, claiming the entirety of the premises, wilfully and designedly misled the plaintiffs and their solicitors as to and respecting the said title, and thereby the plaintiffs were induced to enter into the agreement aforesaid to indemnify Rowntree in respect of the same, which the plaintiffs would not otherwise have done. The consideration of this passage I shall consider hereafter.

The plaintiffs have made three points in argument, [*294] *upon which, or some of them, I think my decision must turn.

The first point is, that the use made by Henry Harding, at the trial of the lease of April 1834, (regard being had to the correspondence before referred to,) made it a case of surprise, against

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which the Court will grant relief. Secondly, that regard being had to the circumstances under which the lease of April, 1834, was granted, Henry Harding was a trustee for the plaintiffs to the extent of their interest in the property. Thirdly, that if the plaintiffs are not entitled at law to the property, they are entitled to relief in equity in respect of the expenditure by their tenant on the property, as to which they had entered into a covenant to indemnify the tenant.

Upon the first of the three points (supposing the second and third not to arise) I had no doubt during any part of the argument. The plaintiffs' case on that point alone cannot be carried higher than this,—that a claimant to an estate in the occupation of the plaintiffs by their tenant refused to disclose his title to his adversary before the trial at law, and also led his adversary to suppose that he intended to meet him in the court of law upon the question of title, and that instead of going to trial upon that issue, he surprised his adversary by setting up a term which enabled him to obtain a verdict by estoppel without going to trial on the question of title. The consequence of this has certainly been that the defendant Harding has got possession of the property in dispute, without the right having been tried between himself and the plaintiffs. The question, then, is, what equity does that state of things give to the plaintiffs? All the questions upon the title were and *are* purely legal ques- [*295] tions. If the plaintiffs had come before the trial they would have got relief to the extent of a decree (for it cannot be had upon motion) restraining Henry Harding setting up the lease of April, 1834. This, however, (owing as I will call it) to a device of Henry Harding, was not done, and Henry Harding has got, or will get, if he sues out execution, possession of the property, and oblige the plaintiffs to assert their title in another ejectment. But that will not give the plaintiffs an equity to have the judgment obtained by Henry Harding set aside, unless the effect of what has passed has been to raise, or unless there exists, an impediment to the trial of the title at law. Here the plaintiffs ask that their case,—that the dry question of legal title,—may be tried under the direction of this Court. But why such

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relief? If there were an impediment, all that the Court would do would be to remove it out of the way. But impediment there is none in the present state of things; for though the lease of April, 1834, was an estoppel as between Henry Harding and his lessee under it, it is no estoppel as between Henry Harding and the plaintiffs. All that the Court could do would be to give the plaintiffs leave to bring an ejectment, which they may do as effectually without the leave of this Court as with it. In answer to the suggestion, that the device by which Henry Harding has recovered the possession of the property without proving his title, and thereby thrown on the plaintiffs the onus of being plaintiffs at law instead of defendants,—the defendant is entitled to the benefit of the observation, that the plaintiffs, by prevailing on Stickney and Rowntree to attorn to them, put Henry Harding out of possession without proof of their title; and the effect of the verdict has only been to restore him to the position [*296] he was in at the death of Lacy Harding. The *question on the Registry Act is a proper question for a court of law, and not for this Court.

Upon the second point I am equally clear. Admitting for the sake of the argument, but no further, that the possession of Henry Harding as regards Lacy, would have made Henry Harding a trustee for him, that would not make him a trustee for the remainderman, against whom he has set up an adverse claim by title paramount.

The third point gives rise to several questions, one of which must, I think, be clearly answered in the defendants favor. If a party in the possession of an estate, knowing that another claims the property, will, with his eyes open, spend money upon it, I know of no case in which it has been held that he can, in the absence of special circumstances, keep the lawful owner out of possession, unless he will reimburse the party in possession the expenditure he has made.[1] That would indeed be improving a man out of his own estate; and I think the same reasoning must apply where one party claims to be tenant in common

[1] The same principle is recognized in *Munro v. Taylor*, 8 Hare, 60.

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with another, and that other denies the tenancy and claims the entirety of the property. I cannot distinguish the two cases. I speak, of course, of those cases in which the claim of the party out of possession has been distinctly made. Here Henry Harding made claim to the entirety of the property in question from the commencement of the correspondence I have referred to, down to the 18th of August, 1846, only four days before the plaintiffs (with full knowledge of that claim) made the agreement for the lease with Rowntree. It is clear that they made that agreement with full knowledge of Henry Harding's claim.

It was said, indeed, that Henry Harding, seeing the expenditure *going on, ought in fairness to have re-as- [*297]serted his claim, but that as a question of law I cannot accede to. Where a party has once given distinct notice of his claim, the onus is on the other side to show he has abandoned, or given reason to believe he has abandoned his claim. The bill does not make that case, nor does the bill, I think, suggest that Henry Harding knew of the terms of the agreement on the 22nd August, 1846. If that be so, it will strengthen the defendant's case, but I do not think it is necessary to it.

With respect to the defendant's alleged delay in bringing the ejectment, it was not such as to affect the case. The bill does not suggest that any fraudulent purpose with reference to the expenditure of Stickney and Rowntree, operated on Henry Harding's mind as a ground for not accelerating the trial. That being so, I cannot, in the absence of such a suggestion, infer a fraudulent motive merely from the fact of Henry Harding passing by the Spring Assizes of 1847.

The plaintiffs, therefore, in my opinion, have no equity, unless an equity is to be found in the passage of the bill which I have quoted above. In that passage it will be remembered that the bill refers to the claim made in the letters. That passage requires very close examination, in order to fix its real meaning. If Henry Harding do not recover anything, the plaintiffs of course will have the full benefit of the expenditure—they will keep the property. The case, therefore, to which the passage in question must apply in the case of Henry Harding recovering the whole

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or part of the property. Now, if he recover the whole, or more than a moiety of the property by a title not derived under the wills of Mary Stephenson and Mary Bowes, his representations in the letters will, to that extent, be justified, and the [*298] *plaintiffs will not, to that extent, have been misled. I must, therefore, understand the passage under consideration as referring exclusively to the recovery by Henry Harding of that moiety to which he was originally entitled under the above-mentioned wills, and to that alone. The question then is on the effect of the passage (so understood) in giving the plaintiffs an equity in respect of the expenditure on the property in consequence of Henry Harding claiming the moiety by a title under the wills I have mentioned. I clearly understand that to be the meaning of the passage; and it must be the meaning. The first observation which occurs is, as to the animus with which Henry Harding made the claim. It cannot possibly have had reference to the expenditure, in respect of which the equity is claimed; for Henry Harding's claim to the entirety was finally made on the 18th of August, 1846, and the expenditure was not contracted for until after that. This observation further confines or imposes a further limit on the meaning of the passage in question, and reduces it to this,—that Henry Harding made his claim to the entirety for the purpose of wilfully and designedly misleading the plaintiffs as to the grounds of his claim to the moiety; that is, for the purpose of concealing his title from them,—for, if the claim has no reference to the expenditure, I can find no other meaning for the passage but the one which I have mentioned. Now, excluding for a moment the animus with which the claim is said to have been made, could it be seriously argued, that a claim exceeding in extent what the claimant knows he is entitled to, would justify the party against whom it is made in treating that claim as a nullity, and justify him in expending money in improvements on property, which property he knows to be claimed by another? Would it justify him so as to make that other his debtor to the amount expended in case the claim should prove well founded? This must be answered [*299] *in the negative; and, in this case, a fortiori, it must

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be so answered, for the only representation made—that which related to Mark Anthony Stephenson's seisin at his death—is in accordance with Henry Harding's title. The equity must, therefore, depend on the animus, and the effect it is said to have produced on the plaintiffs. There are limits beyond which merely general expressions must not be carried even on demurrer. What is the devise by means of which Henry Harding wilfully and designedly misled the plaintiffs? He claimed the entirety of an estate, to one-half of which only, on the statement contained in the bill, he knew he was entitled. How could that mislead the plaintiffs as to Henry Harding's right to part of what he claimed? They say they knew nothing of the wills of Mary Stephenson and Mary Bowes, nor of the ground of Henry Harding's claim; and that they supposed Mark Anthony Stephenson was entitled as heir of his father; and that they, the plaintiffs, were entitled under his will. Henry Harding's claim, under those circumstances, could no more mislead them than would the claim to a moiety, the title to which was unexplained. Still the plaintiffs say they were misled,—that Henry Harding intended to mislead them; and the statement in the bill is, that, in consequence, they treated his claim as a nullity, and expended their money as if no such claim existed. Now, must I not, before I decree Henry Harding to pay for his own estate, inquire, whether the circumstances which the plaintiffs say misled them are such as could mislead anybody not wilfully blind? It must always be remembered that Henry Harding made no misrepresentation. He says nothing, even by implication, which was untrue or inconsistent with his admitted title. My opinion is, that the plaintiffs were not justified in treating the claim, in a case [*300] where they knew nothing of the title, as a *nullity, so as to entitle them to recover back the expenditure. Having come to the conclusion I have stated,—that the plaintiffs have no equity, unless it could be found in the charges I have mentioned, and being satisfied that the charges will not give it, I am of opinion that this demurrer must be allowed.

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[*300]

*POWELL v. THOMAS.

1848: 23rd and 24th February.

A colliery proprietor constructed a railway from his colliery across the lands of several other persons by agreement, and his solicitors wrote a letter to the defendant, across whose lands he desired to carry the railway, referring to the powers of a local act of Parliament, supposed to enable him to take lands within a certain area for roadways, and offering, on the part of the plaintiff, to pay him for the land at a fair valuation. The defendant did not reply to the letter, and the railway was made across his land without further communication with him. A year or two afterwards the plaintiff and defendant had an interview, but did not agree as to the price to be paid for the land, and three or four years after the railway was made the defendant brought his ejectment, whereupon the plaintiff filed his bill for an injunction, charging acquiescence. The Court, on motion, restrained the action, upon the plaintiff giving judgment in the ejectment, and paying a sum into court not less than the amount of the utmost valuation of the land.

THIS was a motion for an injunction to restrain the defendant from disturbing or interfering with the plaintiff in his possession and use of a railway across the land of the defendant, and from proceeding with an action of ejectment, which he commenced for the recovery of the land, which was the site of the railway. The motion was made upon the answer. By the bill and answer it appeared that the plaintiff was the proprietor of his certain collieries in the parish of Lantwit Vardre, in the county of Glamorgan: and being desirous of forming a railway to connect his collieries with a railroad or canal, by which their produce might be conveyed to the sea, he, on or about the year 1842, entered into arrangements with the different proprietors and occupiers of land in the designed line, for a right of passage over the same, agreeing to pay them, in some cases gross sums per annum, and in others a way-leave rent. The defendant was the perpetual curate of Lantwit, and was seised in right of his church of a

[*301] piece of land, over which the *plaintiff proposed to form his road, and the plaintiff's solicitors wrote to the defendant the following letter.—

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"October 25, 1842.

"Sir,—Mr. Thomas Powell is proprietor, lessee, and occupier of certain estates situate in the several parishes of Lantrissant and Lantwit Vardre, with certain mines of coal and ironstone, lying within four miles of the Glamorganshire canal. In consequence of his having been unable hitherto to make arrangements with the land owners for land to form a railway for conveying his coal to the canal, he has determined upon availing himself of the compulsory powers of the act of the 30 Geo. 3, called 'The Glamorganshire Canal act,' for making the railway, in case he cannot otherwise agree with all the landowners. Pursuant to such determination he has caused part of two fields situate in the said parish of Lantwit Vardre, of which you are owner or reputed owner, and which lies between his coal works and the canal, to be accurately measured and mapped; and it will be necessary that he should take 3 roods and 34 perches thereof, a little more or less—for the purposes of the railway. The length of the railway through your land will be about 15 chains and 40 links. The map is lying at Dehewyd, and open to the inspection of the land owners; or, if desired, he will, on hearing to that effect, send a tracing of the part relating to your land for your inspection. Mr. Powell is ready to treat and agree with you as the proprietor, and the rector, lessee, or occupier of those lands, for the damages that may be sustained by the making of the proposed railway or road, and for that purpose he or his agent will wait on you at any time or place you may appoint, and he is willing to give a fair and liberal value for the land. He conceives the amount may be easily ascertained and agreed upon between you, without his having occasion to resort to the compulsory *powers of the Canal Act: he has every [*302] thing ready to work his coal in large quantities, and is, therefore, under the necessity of proceeding in this matter without unnecessary delay. We trust we shall receive your reply on or before the 25th day of November next, which will govern our future proceedings. In case we do not hear from you by that time, Mr. Powell will consider that you refuse or neglect to

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treat with him for the land, and in that case will pursue such course with reference to the land as he may be advised."

The defendant made no reply to this letter, and the plaintiff, without any expression of assent or dissent to the proposal on the part of the defendant, constructed the railway across his land, and thereby formed a junction, not with the Glamorganshire Canal, but with the Taff Vale Railway. In April, 1844, the plaintiff and defendant met, at the request of the former, who produced valuations of the land which he had caused to be made, and according to the average of which estimate the value of the land used for the railway, at thirty years purchase, was 29*l.* 14*s.* 3*d.* The defendant declined to accept the sum offered, both, as he stated in his answer, because he had no power to treat for the absolute sale of the land, and because he considered the price offered to be inadequate, and that the remuneration ought to be by a way-leave of a penny per ton on the goods carried over the land, being the rent which the plaintiff had agreed to pay to a neighboring proprietor. The plaintiff refused to entertain the proposal that he should pay a way-leave, and insisted that the cases of the defendant, and the other proprietor to whom such rent was paid, were not analogous. The parties did not come to any agreement with respect to the payment to be made to the defendant for the land; but the possession of the plaintiff and the use of the railway continued without [*303] opposition until the latter *part of the year 1847, when, after some correspondence, with the view of referring the matter to arbitration which ended without any result, the defendant brought his ejectment against the plaintiff to recover the land. The plaintiff then filed his bill, alleging that the highest valuation of the land in question was 51*l.*; that the plaintiffs had expended upon the railway over it 500*l.* or 600*l.*, with the knowledge and assent of the defendant, and had completed the junction with the Taff Vale Railway, at an expense of many thousands of pounds, of which the part in question was an essential portion, and that the defendant had stood by and witnessed the expenditure of the plaintiff upon the land, without intimating any disapprobation or objection. The bill prayed a

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declaration that the plaintiff was entitled in equity as against the defendant to have and maintain the use of the railway over the lands in question, and that the defendant might be decreed to assure the same to the plaintiff for such estate as he could, the plaintiff offering to pay the defendant the amount of the highest valuation of the land, with interest; and if, from any cause, the Court should hold the defendant not to be bound to take such amount, then that it might be declared that he was bound to take the fair value of, or a fair compensation for, the land; and that the same might be ascertained under the direction of the Court, and the defendants in the meantime restrained from disturbing the plaintiff's possession, or proceeding with the ejectment, or with any action against the plaintiff for damages in respect of the construction or use of the railway.

The answer of the defendant stated, that at the time he received the letter of October, 1842, he had reason to believe that he should not continue to be the incumbent of Lantwit after the year 1845, and he did *not oppose the entry of [*304] the plaintiff upon the land: that he also believed the plaintiff had power, under the said Glamorganshire Canal Act, to make the railway across the land; and he admitted that, under such circumstances, he did stand by and witness the expenditure on the land for completing the railway, without objection: for, under the circumstances, he did not feel that it was his duty to interfere with the progress of the works.

Mr. Romilly and Mr. W. M. James, for the plaintiff, argued that the case was one, if not of agreement, yet of clear and admitted acquiescence; and the Court would not permit the defendant, either capriciously, or to enforce an extortionate demand, to render valueless the road in making which the plaintiff had expended so large a sum: *Clavering's case*,^(a) *East India*

(a) "There was a case—I do not know whether it came to a decree—against Mr. George Clavering, in which some person was carrying on a project of a colliery, and had sunk a shaft at a considerable expense. Mr. Clavering saw the thing going on, and in the execution of that plan it was very clear the colliery was not worth a farthing without a road over his ground, and when the work was begun,

 1848.—Powell v. Thomas.

Company v. Vincent,(a) *Stiles v. Cowper*,(b) *Attorney-General v. Baliol College*,(c) *Williams v. Earl of Jersey*,(d) *Pickard v. Sears*(e).

Mr. *Walker* and Mr. *Headlam*, for the defendant, contended that there was nothing upon which acquiescence could [*305] *be founded. There had been no dealing or treaty whatever, and the case was simply one in which the plaintiff had taken possession of the lands of the defendant without his license or sanction. The mere fact that he had written a letter to the defendant, referring to the existence of compulsory powers for taking the land under the Canal Act, rendered the case less favorable to him; for, while the plaintiff had no such compulsory powers to construct the railway which he had ultimately made, his threats to use those powers might have disarmed opposition, by leading the defendant to believe that resistance would be useless. The case of *The Master, &c. of Clare Hall v. Harding*(f) was also mentioned.

The VICE-CHANCELLOR said that it appeared there had never been any dispute between the parties with respect to the occupation of the land for the purpose of the railway until the ejectment was brought. The only dispute between the parties had been upon the question of price. The plaintiff had reason to believe that the price was the only question between himself and the defendant. It was a case in which the plaintiff ought not to be deprived of the use of his railway, and of the entire benefit of his outlay in constructing it, at least until the question had been determined at the hearing of the cause. But the plaintiff must submit to judgment in the action, and pay such a sum into court

he said he would not give the road. The end of it was that he was made sensible, I do not know whether by a decree or not, that he was to give the road at a fair value." Per Lord Loughborough, L. C., 5 Ves. 690.

(a) 2 Atk. 83.

(b) 3 Atk. 692.

(c) 9 Mod. 411.

(d) Cr. & Ph. 91.

(e) 6 Ad. & El. 474. Per Lord Denman, C. J.

(f) *Supra*, p. 273.

1848.—In re Parry.

as would constitute a sufficient security to the defendant for the price of the land.

The plaintiff paying 200*l*. into court within a month, and giving judgment in the action of ejectment to be dealt with as the Court shall direct, proceedings in the action to be stayed until the hearing, or until the further order of the Court.

*IN RE PARRY.

[*306]

1848: 26th May

Stock standing in the joint names of surviving and deceased trustees may be transferred by the survivors to the Accountant-General under the "Trusts Act," 10 & 11 Vict. c. 96.

THE Trusts Act, 10 & 11 Vict. c. 96, provides that "all trustees or other persons having any annuities or stocks standing in their name in the books of the Governor and Company of the Bank of England, &c., or any government or parliamentary securities standing in their names, or in the names of any deceased persons of whom they shall be personal representatives, upon any trusts whatsoever, or the major part of them, shall be at liberty to transfer or deposit such stocks or securities into or in the name of the said Accountant-general, with his privity in the matter of the particular trusts," &c.

In this case the stock stood in the joint names of four trustees, two of whom were dead. The two surviving trustees were desirous of transferring the trust-fund into court, under the act, and

Mr. *Amphlett*, on the part of the trustees, submitted to the Court that a doubt had been suggested, whether the case of the two survivors, being neither "the trustees" nor "the executors" of a trustee, was within the act.

The VICE-CHANCELLOR was of opinion that the case was within the act.

1848.—Waddilove v. Taylor.

[*307]

*WADDILOVE v. TAYLOR.

1848 : 29th June.

The mortgagee of a fund in Court is entitled to the expense of obtaining a stop-order on the fund in a case in which he is empowered by the mortgage-deed to apply to the Court for that purpose, but such expenses are not allowed by the taxing-master under the common order to tax the costs of the mortgagee.

ON the petition of a mortgagee for payment out of court to him of a fund the subject of the mortgage,

Mr. *Twells*, for the petitioner asked that the Taxing Master might be ordered to tax the petitioner his costs as mortgagee, including therein the costs of and of obtaining a stop-order in pursuance of the usual clause in the mortgage-deed, enabling the mortgagee to apply to the Court for that purpose.

Mr. *Toulmin* for a second mortgagee of the same fund, objected to any special direction as to the costs of the stop-order. The Master would tax those costs without a special order if they were properly a charge upon the fund ; if not, the Court would not give them. The stop-order was a part of the expense of the original security, which should have been paid or provided for by the mortgagor at the time the charge was made.

The VICE-CHANCELLOR having ascertained that the expenses of the mortgagee in respect of the stop-order would not be allowed by the Taxing Master without the order of the Court to that effect, directed the costs, including the expenses of the petitioner in respect of the stop-order, to be taxed, and paid out of the fund.

1848.—*Laurie v. Burn.*

*LAURIE v. BURN.

[*308]

1848: 6th July.

Personal service of the copy of a traversing note may be made, (by leave of the Court, independently of the General Orders,) upon a defendant who has not taken any step to defend the suit either in person or by a solicitor, and where the service cannot, therefore, be made in the manner directed by the 56th General Order of May, 1845.

MR. J. H. PALMER moved, on behalf of the plaintiff, for leave to serve a copy of the traversing note upon a defendant who had taken no step in the cause, either in person or by a solicitor, but for whom the plaintiff had entered an appearance, under the General Order XXIX., of May, 1845.

He referred to the General Order LVI, of May, 1845, which directs the service to be made in a manner not applicable to the case of a party who takes no means of defending the suit, and to the case of *Moss v. Buckley*, in which the Lord Chancellor^(a) said, that in such a case personal service of the copy of the note might be directed, independently of the General Order.

The VICE-CHANCELLOR made the order accordingly.

(a) 16th June, 1848.

1848.—Ward v. Swift.

[*309]

*WARD v. SWIFT

1848: 25th. February; 11th March.

Four plaintiffs instituted an original, and two supplemental causes, and three of the same plaintiffs, on a subsequent abatement, filed a supplemental bill by a new solicitor, making the other plaintiff a defendant, who also appeared by another solicitor. On a petition in the four causes, the solicitor in the last supplemental suit, and not the solicitor on the record in the first three causes, was held to be entitled to appear for the plaintiffs.

The order of the 18th October, 1842, is intended to substitute the solicitor for the six clerks, and not to give the solicitor a right to insist, as against his client, upon acting in the cause until removed by the order of the Court.

A receiver appointed to get in property, part of which he finds in the possession of another receiver, ought not to take proceedings to deprive the latter of such possession, without the authority of the Court.

A motion ought not to be made for committal on the ground of a disturbance of the possession of a receiver, when the object of the motion is merely to compel the payment of costs, after the question with respect to the possession of the property has been settled.

THERE were four plaintiffs in the original bill and two supplemental bills. After a decree in the three causes, reserving the costs of the suits, one of the defendants became bankrupt. Three of the plaintiffs, by a new solicitor, filed a fourth supplemental bill against the assignees of the bankrupt defendant, and also against the other plaintiff in the original suit and the two first supplemental suits, who had not joined as plaintiff in the supplemental cause. A common decree was made in the supplemental suit to carry on the proceedings, not expressing by whom they were to be carried on. A petition in the cause was afterwards presented, and upon that petition

Mr. *Rolt* was instructed to appear for the plaintiff by the solicitor who had filed the last supplemental bill, and

Mr. *Chandless* was instructed to appear for the plaintiffs by the solicitor whose name was upon the record as solicitor for the plaintiffs under an order of the 7th of January, 1845, by which

1848.—Ward v. Swift.

all the four plaintiffs then changed their solicitor, and appointed him.

Mr. *Winstanley* appeared for the plaintiff in the first three causes, who had been made a defendant to the last supplemental bill, and was instructed by neither of the solicitors who claimed to appear for the plaintiffs, but by the solicitor who acted for such defendant in the last supplemental suit.

The question was, who was entitled to be heard on *the petition as truly representing the plaintiffs in the [*310] causes. The single plaintiff who had been made a defendant in the fourth suit was content to appear in his character of defendant, and did not ask to be considered as plaintiff, or complain that the other three plaintiffs had (in effect) taken from him the joint conduct of the causes. The solicitor named upon the record for all the plaintiffs relied on the General Order XVIII. of the 26th of October, 1842, and the order in the causes of the 7th of January, 1845; and the three plaintiffs in the last suit insisted, on the other hand, that the last mentioned solicitor had no authority to appear in the present proceedings for any of the plaintiffs, and had no personal interest in the matter.

The VICE-CHANCELLOR (after enquiring with respect to the practice:—)

Upon the hearing of the petition the question was raised, which of the counsel instructed to appear for the plaintiffs in the original suit was entitled so to appear? As the question (however unimportant in the particular case) appeared to me to involve a point of general importance, I requested the opinion of the registrars. The case I put to them did not in terms raise the very question I had before me. I stated the case into which that question appeared to me to revolve itself. I am indebted to them for their assistance, which in such cases is always valuable. It did not, however, relieve me from my difficulty, for the opinions were not unanimous.

I have since considered the case, and am relieved from the necessity of deciding any general proposition by the

1848.—Ward v. Swift.

[*311] *special circumstances of the case. The case into which the facts before me resolve themselves (as I feel at liberty to consider them) is this,—there were four plaintiffs in the original suit; that suit became defective, and a supplemental bill was necessary. The proper persons to file such bill, regard being had to the decree in the original suit, were the plaintiffs in that suit. One of those plaintiffs refused to join, and thereupon the remaining three filed the supplemental bill, making the other a defendant. He is satisfied, and makes no complaint. No objection is made to the supplemental bill by any one. It is admitted to be regular. I am told that I decided in favor of the regularity of a bill so framed in *Holland v. Lipscombe*.^(a) Who, then, can complain? certainly not the solicitor; he will be protected in the regular way; but he has no personal interest in the proceedings. The orders respecting the entry of the name of the solicitor on the proceedings, and for continuing such solicitor as the solicitor of the parties until changed by an order of the Court, are intended to substitute the solicitor in the place of the six clerks, for the due prosecution of the cause, and not to give the solicitor personally any right as against the parties in the cause.

The order upon the petition directed payment of "the costs of the plaintiffs to Mr. G. Smith, their solicitor:" Mr. G. Smith was the solicitor for the three plaintiffs in the last supplemental cause.

[*312] *By an order made in the cause of *Ward v. Swift*, in May, 1838, J. G. Shepherd had been appointed receiver of the lessor's interest in certain property called Lucas' farm. One Gardler was the occupying tenant of the farm; and on the 12th of June, 1847, the rent being in arrear, Shepherd signed a distress warrant, which was executed on the 14th of June, when the growing crops on the farm were distrained. On the 19th of June, 1847, in pursuance of an order of the Master of the Rolls, in a cause of *Gardler v. Gardler*, Richard Bigg was appointed receiver of (among other things) the interest of Gardler in the

(a) Not reported.

1848.—Ward v. Swift.

same farm. After some communication between the two receivers in respect of the rent, Bigg offering to pay one year's rent (30*l*) to Shepherd, which was refused,—the latter claiming, in addition, about 6*l*., for the expenses of the distress,—both of the receivers took steps to reap the crops, in which Bigg succeeded, by carrying the crops and staking them off Lucas's farm, upon another property, some time before the 11th of August, with the exception of a crop of potatoes, which were gathered later. In September, 1847, another half-year's rent became due, and was demanded by Shepherd, in addition to the rent for the preceding year, and the expenses incurred in the distress, and in the attempt to get in the crops. Bigg tendered 45*l* for the rent, which the agent of Shepherd accepted without the expenses. The acceptance of this sum was alleged by Shepherd to have been a mistake and unauthorized. The expenses were not paid.

Mr. *Rolt* and Mr. *Daniel* moved, in Michaelmas Term, on behalf of the plaintiffs, that Richard Bigg might be committed for a contempt in disturbing and interfering with J. G. Shepherd, the receiver, and in harvesting and gathering the crops of wheat and potatoes, which had been distrained upon by the latter.

*Mr. *Kenyon Parker* and Mr. *Winstanley*, for Richard [*313] Bigg.

The case of *Fitzpatrick v. Eyre*(*a*) was cited.

VICE-CHANCELLOR, after stating the dates of the several proceedings :—

The argument in support of the motion was, that Shepherd, by means of the distress which he had levied, was in possession of the growing crops at the time that Bigg was appointed receiver. Bigg on the other hand, has contended that (if Shepherd ever had such possession) the bailiff had withdrawn before he

(*a*) 1 *Hogan*, 171.

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(Bigg) was appointed, and that the possession of Shepherd was then abandoned. It appears, that, after the crops had been removed, 45*l.* was tendered to Shepherd's agent for the rent,—30*l.* due up to April, 1847, and 15*l.* for the subsequent half-year,—and that was accepted. The plaintiffs say, that the act of Shepherd's agent, in receiving the rent without the expenses, was not authorized; but the money has not been returned, and the plaintiffs' demand for rent is, in fact, satisfied. The expenses claimed, some of which must certainly be due, are, it is admitted, still unpaid. If I were compelled, in this state of circumstances, to decide, simpliciter, which party was right and which wrong, in order now to give the parties what they are respectively entitled to, I should probably confine myself to the inquiry, whether Bigg, when he was appointed, found Shepherd legally in possession of the growing crops or not. But that is not the view of the case which I am forced to take. The wrongful act of Bigg (if wrong-

ful it be) was commenced before or early in the month [*314] of August,—was *complete as to the wheat crops on the 11th of August, and as to the residue of the crops (potatoes and others,) shortly after. If the crops were wrongfully obtained, the parties in *Gardler v. Gardler*, whose agent Bigg is, have been permitted to consider and deal with them as their own. The motion to commit Bigg,—made three months after the act which is complained of,—is not made to protect Shepherd in the possession of property under his receivership, but is resorted to as a mode of obtaining payment of the expenses claimed by Shepherd. I cannot think that such a motion ought to be made, unless the party making it has no other means of working out his rights. The authority of the Court is best vindicated by reserving its extreme powers for cases which imperatively call for them; and this is obviously a case in which (independently of the position of the parties at the time notice of motion was given) Bigg may have acted under an excusable mistake. I am far, however, from meaning to justify his conduct. Knowing that Shepherd was also acting under the authority of the Court, he, or the parties at whose instance he was appointed, should have asked for the directions of the Court, how to proceed. The plain-

 1848.—Hutton v. Hepworth.

tiffs in *Ward v. Swift* might also, instead of coming with a motion to commit Bigg, (a step which the Court avoids, when it can do so without compromising justice,) have applied in the suit of *Gardler v. Gardler*, for payment of Shepherd's costs and expenses out of the fund which they say belonged to them; and this is the course which, before I dispose of this motion, I shall give them the opportunity of taking. Let the motion stand over, with liberty to the plaintiffs to make such application as they may be advised in *Gardler v. Gardler*.

*HUTTON v. HEPWORTH.

[*315]

1848: 14th July.

An order made upon affidavit of service of the notice of motion must not depart from the terms of the notice, even though it be less extensive than the notice, if such less extensive order may be more prejudicial to the party against whom it is made than would have been the larger order which was asked.

The notice was, that the Court would be moved to dismiss an original and a supplemental cause, or to direct the original cause to be put in the paper for hearing: the order made upon affidavit of service was, that the supplemental cause should be dismissed, and the original cause put in the paper: the Court, upon motion, discharged the order.

The application of a party by his counsel for time to answer affidavits filed in support of a motion, whereupon time was given and affidavits filed, is not an appearance by that party on the motion entitling the other party to obtain the order on a subsequent motion day, without an affidavit of service—no counsel then appearing for the opposing party.

ON the 23rd of May, 1848, the defendant Hepworth gave notice of motion, intituled in the original and the supplemental suit, that "*these suits*" might be dismissed as against him, with costs; or that it might be referred to the taxing Master to tax his (the defendant's) costs of these suits, and that the amount thereof might be paid by the plaintiff; or that the first mentioned (original) cause might be put into his Honor's paper of causes again for hearing, for such further or other order as the Court

1848.—Hutton v. Hepworth.

might think just; and that the plaintiff might be ordered to pay the costs of the motion. The motion was supported by affidavit, stating that the original cause had come on for hearing in April, 1846, when it was ordered to stand over, with liberty to the plaintiff to file a supplemental bill, or amend by adding proper parties: that on the 21st of December, 1846, the plaintiff was ordered to file a supplemental bill or amend, on or before the first day of the ensuing Easter Term, or that the bill should stand dismissed, with costs: that the supplemental bill was filed on the first day of Easter Term; and the answer having been duly put in, and no further proceedings taken, notice of motion to dismiss the supplemental bill for want of prosecution was given in January, 1848, which was allowed to stand over by consent, until the 18th of February, 1848, when the plaintiff filed his replication. The motion was made on the 26th of May, when counsel for the plaintiff was instructed to ask for time to answer the affidavit; and on the following day, an affidavit on the subject of the delay was made by the plaintiff's solicitor. On the 1st of June, the next motion day, the counsel for the plaintiff intimated to the defendant's *counsel, that he should [*316] not appear on the motion. The order was then asked for, upon the usual affidavit of service; and the Court ordered the supplemental bill to be dismissed for want of prosecution, with costs, to be paid by the plaintiff, and the original cause to be put on the paper for hearing and the costs of the motion to be paid by the plaintiff.

Mr. Wood, for the plaintiff, now moved that the order made on the 1st of June, 1848, might be discharged, with costs. He contended that the order, having been entirely founded upon affidavit of service of the notice of motion, ought not to have departed from that notice: that the defendant might have obtained an order in either of the alternatives which the notice expressed, (if the facts of the case justified it,) but not in one alternative and part of another. He suggested that the plaintiff might have submitted to the dismissal of both suts for want of prosecution, which would not have precluded him from filing a new bill; but

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that was very different from the order made, which dismissed the supplemental suit, and brought on the original suit for hearing in an imperfect state.

The *Solicitor General** and Mr. *Humphrey* opposed the motion.—The order taken upon the motion was less than was asked by the notice. It was true that a party could not depart from his notice, but there was nothing to prevent him from taking anything comprehended within the terms of his notice. The notice in this case asked to dismiss both suits for want of prosecution, and the Court ordered the dismissal of one suit. The plaintiffs* were probably advised (as the defendant was) [*317] that the original suit could not be dismissed for want of prosecution after the hearing, and that an order to dismiss both suits would therefore be erroneous. The plaintiffs were represented by counsel when the motion was first mentioned, and had afterwards filed an affidavit,—though they had subsequently thought proper not to appear: the question now was, whether the facts of the case justified the order. The present notice of motion did not ask the Court to discharge the former order “for irregularity.” Now the plaintiffs had not asserted that, upon the facts, the defendant would not have been entitled to the order which was made: the objection at the bar was wholly founded on the suggested departure from the notice, which, if it had been shown and amounted to anything, would have been irregularity, and mere irregularity was not open to the plaintiffs on this application. The Court would not, by allowing this objection to the order, sanction the practice adopted by the plaintiffs, of asking for time, and filing affidavits, and subsequently withdrawing from the motion and leaving their adversary to take his remedy as upon default. A similar practice with respect to decrees taken upon default had been put an end to by the late orders.(a) The plaintiffs ought not to show that the order was wrong upon the merits, or the motion should be refused.

* Sir John Romilly.

(a) See the 44th General Order of August, 1841.

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The VICE-CHANCELLOR said that the rule was well known, that an order taken upon the affidavit of service of the notice of motion ought not to depart from the terms of the notice.

[*318] The rule certainly might not universally *prevent a party from taking an order for less than his notice expressed, where the lesser order could be made without prejudice to the party against whom it was to operate. Thus, if a notice of motion was given that a party might be ordered to pay a sum of 500*l.* into Court, the Court might, upon the affidavit, direct a sum of 300*l.* to be paid instead of 500*l.* But suppose the case of an estate, consisting of two parts—one producing a clear income, and the other, from the necessity of preserving a sea wall, or any other cause, requiring an expenditure beyond its annual produce, and that a motion should be made for a receiver of the entire estate,—in that case, the appointment of a receiver of the entirety would involve the necessity of applying part of the surplus proceeds of the productive part of the estate in aid of the preservation of the other, and might not be objected to by the owner of both. But the same party might well object to the appointment of a receiver of the productive part of the estate, leaving the other to bear its charges alone, for which, by the supposition, it was insufficient. The less extensive order would not properly be taken in such a case on affidavit of service. In this case, there were two bills,—one original, and the other supplemental. The motion asked that both suits might be dismissed, or, in the alternative, that the original cause might be put in the paper for hearing. He did not advert to the other alternative, as to the payment of costs, for it was not suggested that such an order could be made. If the order had gone no farther than to direct that the original cause should be put into the paper for hearing, it would have been right. The plaintiffs might then have applied to bring on the supplemental cause; or, if both bills had been dismissed according to the notice, the plaintiffs might have been content, or might have been

[*319] concluded *by the order, if the circumstances had justified it. The order to dismiss the supplemental cause, and bring on the original cause for hearing, was essentially

1848.—*Newton v. Askew.*

different in its consequences from either of the alternatives. The order ought to be discharged, except so far as it directed the original cause to be set down for hearing. The application by the plaintiffs' counsel for time to file affidavits, he should have thought was an appearance on the motion, but he was informed by the registrar that it was not so considered in practice. He would give no costs of this motion.

NEWTON *v.* ASKEW.

1848: 4th, 5th, and 18th July.

A party in a cause, who is interested in a decree which has been pronounced, is privileged from arrest in attending the Registrar's office, on passing the minutes of the decree.

THE cause was instituted by the wife and infant children of Mr. Newton by their next friend, against the trustees of property in which they were interested, and a decree had been pronounced in the cause, directing the payment of a sum of money to Mrs. Newton, and directing the costs of the suit to be paid by the trustees. The decree also directed that the costs of Mr. Newton, who was a defendant, should be paid to him by the plaintiffs, who were to recover them over against the defendants, the trustees. The decree had not been passed by the registrar; and an appointment had been made by the solicitor of the plaintiffs, (who was also on the record the solicitor of Mr. Newton,) to attend at the registrar's office, on the 30th of June, at one o'clock, to settle the minutes of the decree. Shortly before that [320] *hour, Mr. Newton, who was on his way to the registrar's office, pursuant to the appointment, was arrested in Lincoln's Inn, by an officer of the sheriff of Middlesex, under an attachment issued against him for the non-payment of a sum of 19*l.* costs, which he had, in another suit, been ordered to pay to the same persons who were defendants in this suit.

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Mr. Newton was now brought up by habeas corpus cum causa, and moved in person for his discharge. The notice of motion, and the affidavit of the facts of the case, were intituled in the cause, which was a Rolls' cause.

The application was made upon two grounds;—first, that a party to a suit was privileged from arrest when attending the prosecution of the suit, as well in the registrar's office, as before the Court, or the Masters, or before Commissioners in Bankruptcy: *Sidgier v. Birch*,^(a) *Ex parte King*,^(b) *Jackson v. Vaughan*,^(c) *List's case*,^(d) *Franklyn v. Colquhoun*,^(e) *Ex parte Byrne*,^(f) *Arding v. Flower*,^(g) 1 Smith Ch. Pr., p. 514, 3rd ed.; 1 Archbold Pr. Q. B. p. 686, 8th ed.;—and, secondly, that, by the effect of the statute 7 & 8 Vict. c. 96, ss. 57, 58, there could be no attachment for non-payment of any debt or sum under 20*l*., whether in the form of a contempt for disobedience to an order for non-payment of costs or otherwise.^(h)

Semble, where a motion for the discharge of a prisoner is made before the Vice-Chancellor in a Rolls' cause, or in a cause attached to another branch of the Court, the Vice-Chancellor cannot (unless specially authorized) make an order on such application, although the prisoner be brought before him by habeas corpus.

The VICE-CHANCELLOR said that he was compelled to dispose of the motion on a point of form. It had been contended, in support of the application, that every judge had jurisdiction to discharge a prisoner who was unlawfully detained. To that broad proposition there was certainly some qualification. Upon the authorities it appeared that a party who had been committed in the course of proceedings in bankruptcy, could not in all cases be discharged by an order in Chancery; and that a party who had been imprisoned by an order of the Court of Chancery, could not

(a) 9 Ves. 69. (b) 7 Ves. 312. (c) Toth. 218; 14 Vin. Ab. (D. 2.) pl. 2.

(d) 2 Ves. & B. 373. (e) 1 Madd. 580. (f) 1 Ves. & B. 316.

(g) 8 T. R. 534.

(h) The contrary to this argument has since been held by the Lord Chancellor in the case of *Wenham v. Bowman*, 12th July, 1848.

 1848.—*Newton v. Askew*.

in all cases be discharged by the Court of Exchequer. He thought the same rule prevented a judge in one branch of this Court from discharging a party in a cause who had been attached under an order made in another branch of the Court. Mr. Newton had given his notice of motion in a cause in respect of which this branch of the Court had no jurisdiction. It was not that he might not make the order upon the return to the habeas corpus; but the motion had been made before him in a form in which he was precluded from dealing with it.

Application was forthwith made to the Lord Chancellor, who ordered that Mr. Newton should be brought up on the following morning, and that the Vice-Chancellor should hear the application. (a)

*Mr. Newton having renewed his motion on the same [*322] grounds,

Mr. *Kenyon Parker* and Mr. *Hall* opposed the application, contending that the duties of the registrar were merely ministerial, in which respect the case of attending the registrar differed from that of attending the Master or the Court, where the proceedings were judicial. If a party were privileged whilst attending personally to every matter incidental to the prosecution of a suit in Chancery, it would amount to a general protection from arrest so long as the suit could be kept on foot. They cited *Crone v. Odell*; (b) Lord Bacon's Order, 86; Beames' Orders, p. 38.

(a) The order made by the Lord Chancellor was as follows:—" *Newton v. Askew*, Whereas Mr. Elderton, of counsel for the plaintiffs, this day moved the Right Honorable the Lord Chancellor, that a writ of habeas corpus might issue directed to the sheriff of Middlesex, to bring the said defendant, Augustus Newton, now in his custody, before this Court, for the purpose of applying to this Court to discharge his arrest under an attachment issued for non-payment of certain costs directed by an order in this cause to be paid by him, His Lordship doth order that a writ of habeas corpus do issue, directed to the said sheriff, to bring up the said defendant, Augustus Newton, before the Vice-Chancellor Wigram, at the sitting of his court at Lincoln's Inn, in the county of Middlesex, at ten o'clock to-morrow morning, the 5th inst., for the purpose of applying to the said Vice-Chancellor for such discharge, and that the said application be heard before the Vice-Chancellor Wigram."

(b) 2 Moll. 525.

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VICE-CHANCELLOR:—I am not called upon to give any opinion upon the question, whether this attachment for costs was or was not within the act referred to. I think Mr. Newton is entitled to his discharge, upon the ground of his privilege, whilst attending the registrar's office. It is admitted that the parties, in every cause, are entitled to attend the court during the hearing of the cause, and are privileged from arrest whilst they are doing so; and it is also admitted that the same rule applies to the Master's office. The sole question is, whether the privilege extends and is to be applied to attendance at the registrar's [*328] *office. In support of the argument that the privilege had not that extent, it was said that the party is sufficiently represented at the registrar's office by his solicitor. But the same might as well be urged in reference to the attendance at the hearing. The party may then be represented by his counsel and solicitor, but he is not the less entitled to his privilege. I am unable logically to follow the reasoning upon which the distinction is sought to be founded. It was said that the proceeding in the registrar's office is not judicial, but is merely ministerial—the duty of the registrar being merely to draw up the decree which the Court has pronounced. It is, no doubt, perfectly true that the Court ought to give the registrar such directions as will enable him to draw up the decree; but the Court for the sake of greater caution and accuracy, requires all the parties interested in the suit, to have notice of, and to be present, if they please, at the drawing up of the decree, so as to ensure that it shall be in accordance with the judgment given in Court. So careful is the Court in guarding against any error arising from the absence of interested parties, that the rule in the office is, not to draw up the decree until after three notices have been served. It was said that Mr. Newton was not sufficiently interested in the subject of the decree, to entitle him to attend in person at drawing it up. It is not necessary that I should decide whether a merely formal party could insist upon his privilege of being present at the drawing up of the decree; but in this case the party arrested had a direct interest in the decree, which affected him as to the costs of the suit. Again, the consent of counsel or of the solicitor

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might seriously affect the rights of the client, and that is one ground why the party himself may attend to watch the proceedings, and should be protected during such attendance.

I think I cannot do otherwise than order that Mr. Newton be discharged. [*324]

The writ was indorsed accordingly.

Mr. *Kenyon Parker* asked that it might be made a term, that Mr. Newton should bring no action against the parties at whose instance the attachment was executed: *Frost v. Daniell*,^(a) *Lorimer v. Lule*.^(b) The principle was, that the privilege was not in fact the privilege of the party, but of the Court, and therefore no action could be sustained against the sheriff: *Magnay v. Burt*.^(c)

Mr. *Newton*, in person, opposed the application.—He submitted that the Court was bound to make an order upon the habeas corpus, either discharging him from prison, or remitting him to custody, and that the order could not be made conditionally. He also adverted to the fact that the arrest was made at the suit of persons from whom he and his family had, in the other suit, recovered costs, which were yet unpaid, and to which the minutes of the decree related, and thence argued that malice might be inferred.

Cases in which the Court, upon ordering the discharge of a party from his arrest, will impose upon him the condition that he shall bring no action in respect of the arrest.

The VICE-CHANCELLOR said, that in this case there was a lawful ground for the arrest,—the liability of Mr. Newton to pay the costs which were the subject of the *attach- [*325] ment, had not been denied: the only objection was on the question of privilege, on which it had been decided that he was entitled to be discharged. The distinction between the cases

(a) 4 Q. B. 380.

(b) 1 Chitty, 134.

(c) 5 Q. B. 381.

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referred to at law, and the present case, was that in the former the error had arisen entirely from some irregularity or slip in the proceedings, which were otherwise proper, and in which the circumstances excluded the possibility of the parties having been actuated by any personal hostility or malice.* He by no means thought that there had been any malice in this case. The point upon which the question of the discharge of the arrest had turned had not been previously decided, a fact which would probably weigh with any jury before whom the case might come. He did not think it was a case in which any terms ought to be imposed upon the party.

 RODGERS v. NOWILL.

1846: 4th, 5th, 6th, 23rd, and 26th May; 30th June. 1847: 21st, January; 9th July; 9th and 10th December.

In a suit for an injunction against the use by the defendant of a certain name and mark upon their goods, the defendants admitted the use of the name and mark, but said that it was their true name, and that they were entitled so to use it: the plaintiffs, without moving for the injunction, went into evidence in equity. At the hearing of the cause, the Court being of opinion that the evidence did not establish the plaintiffs' right to the injunction, but that it showed the defendants to have used the name and mark in question on their goods, in a manner which might lead purchasers to understand falsely, that the goods were manufactured by the plaintiffs,—gave the defendants the option either of having the bill dismissed against them without costs, or of having the right tried at law.

The bill being retained for a year, with liberty to the plaintiffs to bring an action at law, the action was brought, and the plaintiffs recovered a verdict. The Court then granted the injunction, and ordered the defendants to pay the costs at law and in equity, except the costs of the evidence in equity.

Where the question of equitable assistance depends on the legal right, and the legal right is denied by the answer, the plaintiff may move for leave to try the legal right, without asking for an injunction in the mean time.

Upon a bill for an injunction to restrain the defendants from using a certain mark, alleged to be fraudulently used by them on goods, in order untruly to denote that such goods were manufactured by the plaintiffs, the Court at the hearing retained the bill, and gave the plaintiffs liberty to bring an action, but refused to direct any admissions to be made by the defendants on the trial of such action.

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Where a bill had been retained at the hearing, with liberty for the plaintiff to bring an action, it is not irregular for the plaintiff, on having a verdict in his favor, to obtain an order for setting down the cause on further directions or on the equity reserved, although the time at which the defendant may move for a new trial shall not have arrived.

THE plaintiffs were Joseph Rodgers & Co., cutlery manufacturers, at Sheffield. The defendants were John and William Nowill, also cutlery manufactures and merchants, of Sheffield, and William Rodgers. The *plaintiffs, or the [*326] firm which they represented, had carried on business at Sheffield from the year 1801, and had originally used on their cutlery the mark "Rodgers," which had been awarded to them by the master wardens and assistants of the Company of Cutlers in Hallamshire: this mark had been varied to "Rodgers & Sons," and "J. Rodgers & Sons," and upon the appointment of the firm to be, successively, cutlers to their late Majesties George the Fourth and William the Fourth, and to her Majesty, they adopted a crown between the initials of the reigning sovereign, in addition to "J. Rodgers & Sons." The bill, which was filed in August, 1843, stated, that the penknives, pocket knives, table knives, razors, scissors and articles of fine cutlery manufactured by the plaintiffs' firm, and bearing their name and mark, had been for many years, and still were, in very high estimation in this kingdom and foreign countries, and that such articles of their manufacture were distinguished by the said marks, and considerable profits were derived by the plaintiffs from the sale thereof: the bill alleged, that the plaintiffs had lately discovered that the defendants John and William Nowill had for a considerable time past manufactured or purchased and sold, or caused to be manufactured or purchased and sold, large quantities of cutlery, and particularly of penknives and pocket knives, stamped or impressed with marks in exact or very close imitation of the marks used by the plaintiffs, for the purpose of passing off or enabling other persons to pass off such articles of cutlery on purchasers as of the plaintiffs' manufacture; and that in order more securely to practice such fraudulent imposition, the defendants John and William Nowill had agreed or come to some understanding

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with the defendant William Rodgers, who was a penknife-blade grinder, for the use of his name, in consideration of his [*327] receiving in addition to his wages *as a grinder for the defendants, John and William Nowill, a per-centage on the cutlery manufactured by or for them, impressed with the name or mark of "Rodgers," or such other counterfeit mark in imitation of the plaintiffs' mark; that, to give a color of right to their proceeding, the defendants pretended that the name "Rodgers & Sons" used by them did not mean the plaintiffs' firm, but a pretended firm consisting of George and Samuel, two brothers of the defendant William Rodgers, and John Rodgers their father, alleged to be carrying on business under the firm of "John Rodgers & Sons." The plaintiffs alleged that no such partnership in fact existed, that John Rodgers the father had for several years kept a beer-shop, occasionally working as a table-blade forger, and that by such designation he took the benefit of the Insolvent Act in 1839; that he had not since had any workshop or ostensible place of business; that George Rodgers had succeeded his father in the occupation of two hearths, at which he worked as a table blade forger; that neither Samuel nor William had ever been manufacturers of cutlery: and that Samuel was a scissors grinder, and had kept a public-house; that in June, 1843, the defendants had colorably taken a workshop in Sheffield in the name of "John Rodgers & Sons," but the defendant William Rodgers was alone answerable for the rent, and the father or brothers had no interest in the shop. The bill prayed an injunction to restrain the defendants from manufacturing and selling, or causing to be manufactured or sold any penknives, pocket knives, or other articles of cutlery stamped or marked with the stamp or mark therein mentioned, or with any other mark or stamp in imitation of the marks or stamps used by the plaintiffs on the articles of cutlery manufactured by them, or with [*328] any mark or marks containing or consisting *of any combination of words or letters, designating, or intended or appearing to designate, the plaintiffs' firm; and for an account of the profits made by the defendants from the sale of cutlery with such counterfeit marks or stamps.

1844.—Rodgers v. Nowill.

The defendants, by their answers, filed in December, 1843, denied that the plaintiffs were exclusively entitled to use the name or mark of "J. Rodgers & Sons." They said that there was and had been for eight years or thereabouts a partnership or firm of working cutlers in Sheffield, carrying on the said business under the name and style of "John Rodgers & Sons;" which firm was composed of the defendant William Rodgers and his said father and brothers; and that their manufactory or place of business was in Nursery-street; that the defendants John and William Nowill had been informed and believed that the business of said firm of "John Rodgers & Sons" was conducted by the partners in several different departments, to one of which every partner principally attended; that the said firm of "John Rodgers & Sons" was in the habit of stamping and impressing upon goods which they manufactured, and sold, the said marks,—not an imitation of the goods of the plaintiffs, but as the goods of the said firm of "John Rodgers & Sons." They said that the use of the crown and the initials of the reigning sovereign as a mark on cutlery had not been peculiar to the plaintiffs, but had been adopted by any manufacturer of cutlery, indiscriminately, who thought fit to do so; that it was the words "Cutlers to her Majesty" which in fact, constituted the distinction of the plaintiffs' goods; and they insisted that the firm of "John Rodgers & Sons" were well entitled to stamp or engrave the said marks upon the articles of cutlery made or sold by them; and that they (the *defendants) were entitled to purchase [*329] and deal in such last-mentioned articles. The defendants said that Sheffield was the principal place in this country for the manufacture of cutlery, and orders for goods were sent by dealers to the defendants, and to other merchants and manufacturers there; and that upon some occasions such dealers had requested that the goods so ordered by them should be made by, and should bear the names of, particular manufacturers; that occasionally, persons ordering goods from the defendants had desired that such goods should be named or marked with the names of "Rodgers & Sons," and sometimes with the names of the plaintiffs, by their said firm or style of "Joseph Rodgers & Sons," and

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that, in executing such orders, when the defendants had been desired to send goods marked with the said names of "Joseph Rodgers & Sons," they had in all instances ordered and purchased the same from the plaintiffs, but when the defendants had received orders for such goods, only requiring the same to be marked with the name of "Rodgers & Sons," they had ordered and procured the same to be manufactured by and had purchased the same from the firm of "John Rodgers & Sons," from whom they could obtain the same equal in quality and at a lower price. The defendants denied that they had used any counterfeit mark or stamp.

The plaintiffs did not make any interlocutory application for the injunction, but went into evidence and examined witnesses for the purpose of proving the allegations in the bill. The cause came on for hearing in May, 1846.

Mr. Bethel, Mr. Malins and Mr. Shee, for the plaintiffs.

[*330] *Mr. Kenyon Parker, Mr. Romilly, and Mr. Bacon, for the defendants.

The arguments were directed, first, to the effect of the evidence in the cause, as sustaining or rebutting the case made by the plaintiffs; and, secondly, on the question whether, in a case in which the suit was brought to protect a legal right, the plaintiffs were entitled to any decree, inasmuch as they had not established their title at law. On this point the cases of *Bacon v. Jones*,^(a) *Knight v. Marquis of Waterford*,^(b) *Motley v. Downman*,^(c) and *Millington v. Fox*,^(d) were cited for the defendants. The cases of *Knott v. Morgan*,^(e) *Perry v. Truefitt*,^(f) and *Croft v. Day*,^(g) were also cited.

June 30th.—VICE-CHANCELLOR (after stating the points in issue upon the pleadings :)—

(a) 4 Myl. & Cr. 433; S. C., 1 Beav. 382, nom. *Bacon v. Spottiswoode, Bacon v. Jones*.

(b) 11 Cl. & Fin. 653.

(c) 3 Myl. & Cr. 1.

(d) Id. 338.

(e) 2 Keen, 213.

(f) 6 Beav. 66, 418.

(g) 7 Beav. 84.

I cannot, in the state in which this case is brought before me, decide the question as to the alleged partnership of "John Rodgers & Sons," as a matter of fact, until the case has been tried at law. Supposing that there is such a partnership, I shall abstain from expressing my opinion upon the point of law which then arises, except so far as to say that I am clear the Court ought not to make a decree in the plaintiffs' favor until they shall have established their title at law. The observations of Lord Cottenham, in *Motley v. Downman*,^(a) and [*331] in the case of *Bacon v. Jones*,^(b) would be fully sufficient to justify this conclusion on my part; I think also the observations of the Judges in the case of *Craushay v. Thompson*,^(c) and those of Lord Langdale in *Perry v. Truefitt*,^(d) strongly enforce the necessity of this question being tried at law before a court of equity can come to any conclusion upon it. Then comes the question whether the plaintiffs are entitled to that indulgence,—that is, to have an opportunity of proving now that which they have not sufficiently proved for the purposes of the decree. Upon that point I respectfully follow Lord Cottenham in saying, that it is impossible to lay down any general rule for cases like these. I may, perhaps, venture safely to infer from the case of *Bacon v. Jones*, that in cases between traders, affecting the conduct and profits of their business, the omission on the part of a plaintiff to establish his legal right, either before the bill is filed, or if not, to establish it by the leave of the Court before the hearing of the cause, is a circumstance always unfavorable to a claim for indulgence at the hearing. It appears to me that every observation of Lord Cottenham in the case of *Bacon v. Jones* in principle applies to the case before me. It was suggested by Mr. *Bethel*, that the defendants, having by their answer set up the existence of a partnership of "John Rodgers & Sons," made it impossible for the plaintiffs to apply to this Court for leave to try the case before the hearing,—that the case thus made by the defendants was untrue in fact; and that that distinguishes the present case from

^(a) 3 Myl. & Cr. 1.^(b) 4 Myl. & Cr. 433.^(c) 4 Man. & Gr. 357.^(d) 6 Beav. 65.

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that of *Bacon v. Jones*. I confess I do not feel the force of that argument. Independently of the observation that the [*332] plaintiffs might have accompanied *their bill by affidavits filed before the answer, by which means they would have had the benefit of using affidavits after the answer, and that they might have made an application to the Court for leave to try the case at law, it appears to me that the plaintiffs' argument at the bar has furnished a complete answer to the observation upon which the distinction between the cases is supposed to be founded. The argument was, that, in point of law, the existence of the alleged partnership makes no difference. If that be so, there was no more reason why the parties should not have applied and obtained leave to try the case at law before the hearing, then if the partnership had not been suggested. It was not necessary that the plaintiffs should have moved for the injunction. If the answer did not admit their case sufficiently to allow such a motion to have been made with success, they might have applied for leave to bring an action, which, upon the pleadings, the Court would not have refused.

My opinion, therefore, is, that, if in this case I follow the case of *Bacon v. Jones*, and simply dismiss the bill, I should be following a case of very high authority; and that the plaintiffs, having had that case before them, would have no right to complain.

I have, however, thought it right to examine the defendants' case before taking so strict a course against the plaintiffs,—a course which would have the effect of rendering this suit useless, and if the defendants are injuring the plaintiffs in the way complained of, may lead to another suit, in which the same question will have to be tried again. Now the defendants themselves (besides the proof given in support of it) admit that if they received an order from a customer in London or elsewhere for pen- [*333] knives or clasp knives, to be marked with *the name of "Joseph Rodgers & Sons," or to be procured from that firm, they sent it to the plaintiffs; but if the word "Joseph" was not used in the order, or the plaintiffs' firm was not particularly mentioned, they then sent it to "John Rodgers'" firm,—the effect

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of which is that the defendants (to say the least of it) took the chance of imposing upon their customer goods different from what that customer expected:—a person who sends an order for knives of the manufacture of Rodgers & Co. can hardly be supposed to be indifferent as to who is Rodgers, or not to have some definite person in view. He may have meant Joseph Rodgers the plaintiffs' firm, or he may have meant John Rodgers the defendants' firm; but it is extremely difficult to believe that he did not mean some particular firm, or that he had any value for the name of Rodgers, except so far as Rodgers was understood in the trade to be the person whose goods were of a peculiar value. The defendants, however, admit that unless they were directly told to send the order to "Joseph Rodgers & Sons," they took the chance of committing a fraud upon their customer, or at least of supplying him with goods different from what he expected, and that they procured them to be made by John Rodgers & Sons. That is a part of the defendants' case about which there is no question, for it is what they themselves state to have been their practice. On the other hand, I must say that there never was a case which showed more clearly than this the great hardship which is adverted to in *Bacon v. Jones*, of a tradesman being called upon to account for what he has been doing for three or four years during the progress of a suit, and of being subjected to the expense of going into evidence in the suit, when it is certain the case, after all, must be tried at law, and the expense of taken evidence in equity be thrown away.

I think the justice of this case will be best satisfied, if *instead of at once taking the course, pursued in *Bacon* [*334] *v. Jones*, of dismissing the bill, I retain the bill, in order that the plaintiffs may bring an action,—if they think fit to waive the account and pay the costs of the evidence in equity. If the plaintiffs do not do that, I shall then dismiss the bill without costs, unless the defendants (the Nowills,) in order to save themselves from the costs of the suit, (if they think they can save them,) are desirous that I should retain the bill in order that the action might be tried at law. The plaintiffs have the first option; if they accept the terms which I have stated and succeed at law,

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they will be protected in the same way as the Master of the Rolls protected the parties in *Day v. Croft*.

I may observe, that, whatever the fate of this suit may be, the defendants, if they desire to avoid further litigation on the subject, have only to add their residence or place of business, or to add the name "John" to "Rodgers & Sons" or some sufficient distinction to the mark on their cutlery, to remove all objection to the use of their name upon their manufactures.

The plaintiffs did not consent to pay the costs of the evidence, and the defendants declined the terms of having the bill dismissed against them without costs.

Order that the plaintiffs' bill be retained for a year, with liberty to the plaintiffs in the meantime to proceed at law touching the matters in question in this cause as they may be advised, but in case the plaintiffs shall not proceed at law, and proceed to trial, within the time aforesaid, the plaintiffs' bill thenceforth to stand dismissed out of this Court with costs, to be taxed, &c.; but in case the plaintiffs shall proceed at law, and to trial as aforesaid, within the time aforesaid, then the Court doth reserve the consideration of the costs of this suit, and all further directions, until after such trial shall be had. Liberty to apply.

[*335] *In Michaelmas Term, 1840, the plaintiffs brought an action on the case against the defendants. The declaration stated, in substance,—the business carried on by the plaintiffs,—their use of the mark in question on their cutlery, to denote that it was of their manufacture, and to distinguish it from that of others,—the estimation in which the cutlery so made and marked by them was held, and that the plaintiffs derived great gains from the sale of such cutlery; and it alleged that the defendants did, at the time therein mentioned, wrongfully, knowingly, and fraudulently prepare, manufacture, and make for sale, and cause to be prepared, manufactured, and made for sale, cutlery as alleged, in imitation of that prepared, and manufactured, and made by the plaintiffs, and mark the same with a stamp or mark (therein described) in imitation of the stamp or mark of the plaintiffs, and of a form, letters, signification, and appearance very much resembling the same, and in order to denote that the said

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cutlery was prepared, manufactured, and made by the plaintiffs; and that the defendants did wrongfully and fraudulently sell or cause to be sold for their own gain the said cutlery, under the false color or pretence that the same was cutlery prepared and manufactured by the plaintiffs, to the plaintiffs' damage, as thereby alleged.

The defendants pleaded to the action, first, not guilty; secondly, that the plaintiffs were not cutlery manufacturers, &c. as alleged; thirdly, that the plaintiffs were not accustomed to mark their said cutlery with the stamp or mark as alleged; and fourthly, that the said cutlery was not so marked by the plaintiffs to denote that it was of their manufacture, and to distinguish it from that of others, as alleged.

*Mr. *Malins* and Mr. *Shee* moved, that, in the action [*336] at law, and for the purpose of the trial, the defendants might be ordered to admit the use of the marks in question upon their cutlery by the plaintiffs, and the use of the marks by the defendants, as admitted in their answer. Upon these facts they submitted that there had been no dispute. The only questions upon which the Court was not satisfied and did not decide were, first the question of fact of the existence of the partnership of John Rodgers & Sons; and secondly, if that fact were proved, the legal question of the effect of it, as a justification of the defendants in using the marks which it was admitted they had in fact used.—They mentioned *Stevens v. Praed*.(a)

Mr. *Kenyon Parker*, Mr. *Romilly*, and Mr. *Bacon*, opposed the motion.—The plaintiffs had to establish a legal right as a foundation for the assistance of the court of equity, and not a mere fact, as a ground for the exercise of its equitable jurisdiction; and the legal right must be established in all its particulars without equitable aid. The defendants had possibly admitted many facts of the case in their answer, and that answer it was competent for the plaintiffs to use in the action at law, but they must

(a) 2 Ves. jun. 519.

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use it subject to the ordinary rule at law, which required them to read the whole answer if they would read a part: the plaintiffs could not be relieved in equity from the rules of evidence, which prevented them from using the admission of a fact, and at the same time from excluding the circumstances by which it was qualified. The application was in fact to vary the decree.

[*337] *The VICE-CHANCELLOR said, the application was not necessarily irregular because it was made after the decree. It might happen that the difficulty did not appear until the pleadings were made up at law. He also thought that where the Court retained the bill, giving the plaintiff liberty to bring an action and make the best case he could, it had still jurisdiction to direct such admissions to be made as would secure a fair trial of the question at law, as well as where the Court directed an issue or an action. The ground on which the plaintiffs asked for the admissions was, that no issue was raised by the defendants on the facts referred to. The defendants, no doubt, admitted the use of the particular mark or name, but they said that it truly expressed their own names, or the names of the firm which had a right to use it. The Court could not direct the defendants to admit the use of the mark without the qualification, which raised the question, whether there was any such false or fraudulent intent or result as should prevent the defendants from marking their own names on their goods. If the plaintiffs wanted discovery in aid of the trial at law, the Court would give it to them in the ordinary way on a bill for that purpose.

Motion refused.

Affirmed on appeal.

The cause was tried in Middlesex, before Mr. Justice Williams^(a) and a special jury, on the 21st and 22d *of June, 1847, and the jury found a verdict for the plaintiffs.

(a) The learned judge, in directing the jury, read the judgment of Lord Langdale in *Croft v. Day*, 7 Beav. 88, 89, as expressing the law applicable to the case.

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9th. July—The plaintiffs immediately obtained an order for setting down the cause for further directions. The defendants moved to discharge the order, with costs to be paid by the plaintiffs.

Mr. *Kenyon Parker*, Mr. *Romilly*, and Mr. *Bacon*, in support of the motion.—The order is premature. The cause is not ripe for hearing; *Dixon v. Olmius*.(a) The record is not complete until the postea is delivered; and the defendants have until the expiration of the first four days of the next term, to move for a new trial. 2 Dan Ch. Pr. 1079, Headlam ed., and the earlier books of practice.

Mr. *Malins*, and Mr. *Shee*, contra,—cited 2 Smith Ch. Pr. 91, 100, 3rd edition, in which it is said that the cause, either on an issue or an action, is set down “after verdict.” It is clear that the practice is stated erroneously in 2 Dan. Ch. Pr. 1079, with regard to setting down the cause after “issue,” for the application for a new trial is not then made to the court of law.

The Registrars differed in opinion as to the time at which the plaintiff was, in such a case, at liberty to set down the cause and renew his application for the injunction.

The VICE-CHANCELLOR made no order upon the motion.

9th. December—On the case coming on for further directions the plaintiffs asked for the injunction, and the costs of the suit: the defendants resisted the application for costs. [*339]

VICE-CHANCELLOR:—The plaintiffs are entitled to the injunction. I think they are entitled to the general costs of the action at law; the costs of the evidence in equity I do not think they are entitled to. It appears to me those were costs incurred unnecessarily. I do not think it is absolutely certain, because the plaintiffs have succeeded in obtaining a verdict in the action,

(a) 1 Ves. jun. 153.

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that there may not have been a partnership. But it appears to me it is a case in which they ought not to have gone into evidence in equity. I cannot lay down any general rule upon the matter. Lord Cottenham has said that the strictly proper course is for parties to establish their case by evidence before they come to equity. That is not commonly done. The common practice is to apply for an injunction in the first instance. The moment the party files his bill he may, as a matter of course, get the right to try the action. I do not know why parties do not do so.

Mr. *Malins* asked that the costs of the defendants' motion to discharge the order for setting down the cause, should be included in the general costs.

Mr. *Kenyon Parker* said the order was irregular.

VICE-CHANCELLOR:—No. The order was not irregular. I satisfied myself by inquiry at the time that there was no irregularity. I think the motion should not have been made.

 1847.—The Duke of Beaufort v. Morris.

*THE DUKE OF BEAUFORT v. MORRIS.

[*840]

1847: 5th and 7th June, and 27th July.

On a bill for an injunction to protect the plaintiffs' coal mines from injury by the water flowing to them from the defendants' colliery, the Court on motion granted an injunction restraining the defendants from working their coal mines in any places which might injure or endanger the plaintiffs' mines until answer, or further order, but gave no directions for the trial of the right in a court of law. The parties went into evidence, and the cause was brought to a hearing, when the Court refused, until the plaintiffs had established their right at law, to make the injunction perpetual, but retained the bill for a year, giving the plaintiffs liberty to bring such action as they might be advised, continuing the injunction in the meantime.

Whether the present practice of the Court is in any case upon motion (not ex parte) to grant an injunction for the purpose of protecting a legal right which is not admitted, without providing by the order for the trial of the right in a court of law—*Quære?*

The circumstance that the defendants submit to an injunction granted upon an interlocutory application, and that none of the acts complained of were subsequently repeated, is no objection to the injunction being made perpetual at the hearing of the cause.

THE Duke of Beaufort, as the lord of Gower, is or claims to be entitled to all the royalties of the manor of Kilvey on the east, and of the whole county of Glamorgan on the west of the river Tawey, including the soil of all the navigable rivers and streams within the flux and reflux of the tide. In the year 1754, the then Duke granted to Lockwood Morris and another a lease for ninety-nine years of the veins and mines of coal and culm under the wastes and commons of a manor on the west of the Tawey, called Trewyddfa, subject to be determined by the Duke as to the mines which might not be worked. The coal in Trewyddfa and the neighboring district lay in two veins, called the three-foot vein and the six-foot vein. Under the lease of 1754 the lessees worked the collieries until the year 1795, when, from the quantity of water flowing into the mine becoming too great to be removed by the machinery employed, the collieries ceased to be profitable, and the workings were discontinued. In 1800,

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after the lease of 1754, as to some of the veins, had been determined by the Duke, Lockwood, Morris, & Co., the then lessees, erected a powerful engine, called the "Landore engine," for the purpose of draining the remaining mines which were then held under the lease; the erection of this engine enabled the working of the Landore Colliery to be resumed. In 1802, new arrangements were made between the Duke and his lessees; and in June, 1802, the Duke demised the Landore engine and machinery, for twenty-six years, to Lockwood and others, who covenanted to keep the same at work during the term, so as to drain off all the water it should be capable of drawing: and power was given to them to open one communication through the three-foot [*341] *vein to one of their neighboring collieries. In March, 1803, the Duke demised to Sir John Morris the Landore Colliery and the reversion of the engine, and all the veins under Trewyddfa, (except those which were still subject to the lease of 1754,) and other lands, for a term of forty-two years. In 1828, Sir John Morris became lessee in possession of the whole of the veins under Trewyddfa, and the engine,—called, together, the Landore Colliery. His lease expired in 1845.

In the year 1770, John Smith was the lessee, from Sir William Mansel, of collieries sometimes called the Pentre Colliery, sometimes called Drew's Pit Colliery, and at other times described as a part of the Landore Colliery, which adjoined the collieries of the Duke under Trewyddfa; and he was also the lessee of minerals on the other side of the river Tawey. In 1773, in order to effect a communication with his collieries on the opposite side, John Smith extended the workings of his collieries under the bed of the river Tawey. In attempting to form this communication he broke through his boundary into the Trewyddfa mines belonging to the Duke; but, in consequence of the gravelly nature of the soil, and of the quantity of water thereby brought into the colliery, the prosecution of his works near or under the river was abandoned. The working of the Pentre Colliery was continued by John Smith until 1780, when it ceased, in consequence of the influx of water to the mine. The Landore Colliery continued to

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be worked by the Duke's lessees until a period considerable later, as above stated; but sometime after the boundry had been broken by Mansell's lessees, the workmen of the Landore Colliery, working within their own bounds, struck into the abandoned workings from the Pentre branch, and thereby opened a communication between the two collieries, whereby the Landore Colliery was *exposed to the influx of water from [*342] the Pentre Colliery, and also to the risk of inundation from the river. The effect of the Landore engine, erected in 1800, was not only to drain the Landore, but also the Pentre Colliery; and the latter being thus relieved from the water by which the working had been obstructed, the Smiths opened a new pit, called "Drew's Pit," in the Pentry Colliery, near the river. In this state of things, in the year 1805, Morris & Co., the Duke's lessees, filed their bill against the Smiths, stating the fact of the boundary having been broken, and alleging that their workmen had very lately struck into divers other old workings and encroachments, which had been wrongfully made by the Smiths within the boundary of the Duke's colliery; that, owing to such communications, the water from Smith's colliery was thrown into the Duke's Landore Colliery; and that, from the contiguity of the river, and the loose and gravelly nature of the soil and of the bed of the river, an immense quantity of surface and other water must have collected in the pits belonging to the Smiths, since they had desisted from working them; and that, in further working such pits, there was very great danger that the Landore engine would be overpowered, and the collieries inundated and destroyed. The bill prayed an injunction to restrain the defendants from in any manner working or getting out coal from the colliery held by the Smiths as Mansell's lessees, until the breaches or communications which had been so made by them should have been well and effectually stopped up by the defendants, or until they should have, in such manner as the Court should direct, duly and effectually secured, by sure and sufficient barriers or other means, such several communications then subsisting between the said two collieries of Morris and Smith. An injunction was applied for according to this prayer; and on the

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[*343] 31st of August, 1805, an order was made *by Lord Eldon, that it should be referred to Ralph Dodds; or if he declined it, then to John Robson; or, if he declined, then to John Watson; or if he declined, then to ——— Plummer, to inquire and state to the Court in what places the digging and working of the defendants' coal-mine would injure or endanger the plaintiffs' mine and the Landore engine. And in the meantime, it was ordered, that the defendants be restrained by the injunction of the Court from doing any acts, and from digging and working their coal-mine in any place where they might injure or endanger the plaintiffs' mine. And it was ordered, that the said referee should inquire and state to the Court in what places the digging and working the coal works taken by the plaintiffs, Lockwood and others, from the defendants, Smith & Co., as mentioned in certain affidavits of Charles Smith, or the digging and working the coal-mines of the plaintiff Morris, immediately adjoining the defendants' mines, would injure and endanger the defendants' said mines; but the referee was not to look at any other places than such as were pointed out in the said affidavits.

The effect of this order was differently represented in this suit. The plaintiffs, by their bill, stated, that the injunction was obeyed, and the danger to their mines thereby averted; whilst the defendants said that the order remained a dead letter, and was frequently violated; and that by reason of the great extent and position of the mineral works communicating with the Landore engine, it had not been possible to prevent the owners of the neighboring collieries from letting down large quantities of water upon the Landore colliery and engine, for which the lessees thereof never received any compensation. The defendants, moreover, alleged, that this injunction related exclusively to the six feet-vein, which was eighteen *yards above the three-feet vein, in which were the present workings. It did not appear that any report was ever made by the referees named in the order, nor that any application was ever made to discharge the injunction.

The interest of the Smiths in their colliery was purchased by Sir John Morris in or before the year 1828, and from that time

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until the expiration of the first lease, in 1845, the Landore Colliery and the colliery called the Pentre or Drew's Pit Colliery, were vested in and worked by the same lessees; and during this period, the whole of the collieries were drained by means of the Landore engine, aided by another engine called the Cwm Pit engine, by which the water in Cwm Pit, a part of the Landore Colliery, was pumped up to an adit leading to the Landore engine. A farm called Cae Grobos, in which there was a colliery, situated near the Pentre Colliery, also belonged to Sir John Morris. By an agreement between the defendant Sir John Morris and George Byng Morris, made in 1842, the interest of Sir John Morris in all the collieries became vested in the defendant George Byng Morris.

The bill was filed in December, 1845, by the Duke of Beaufort and the Marquis of Worcester, as the tenants for life with the immediate remainder in fee of the seigniority of Gower, stating, that the plaintiffs had lately discovered that the defendant George Byng Morris had excavated ways and communications under the Tawey from Drewe's Pit to coal-works belonging to him on the Kilvey side, thereby increasing the quantity of water brought down to the Landore engine, and endangering the colliery by exposing it to inundation from the river. The bill also stated, that the workings of the Pentre Colliery, which were situated to the dip of Cae Grobos Colliery, had so extended, that they were within a hundred *yards or less from the old [*345] workings at Cae Grobos, but the space between comprised solid coal on both sides of a fault, forming a natural barrier between the workings of Pentre and Cae Grobos: that the defendant was then working or forming a drift upwards from the Pentre Colliery for the sole purpose of forming a water communication with Cae Grobos Colliery, and he intended to carry on such drift, so as to complete such communication; and if this was effected, the whole of the stock of water situated to the dip of the then existing drainage of Cae Grobos would necessarily find its way through the Pentre Colliery to the Cwm Pit engine, and would have to be raised to the surface by the Landore engine, to the manifest injury of plaintiffs, and to the great and imminent

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danger of the Landore Colliery. The bill charged, that, although the existing barrier of solid coal and other strata which then protected the Landore Colliery from the water of Cae Grobos was on the property of the defendant Sir John Morris, yet that the defendants could not rightfully or lawfully make an opening through the said barrier for the purpose of letting, or so as to let, such water down into the plaintiffs' colliery.

The bill prayed that the defendants might be decreed to account for and pay to the duke the injury and damage occasioned by the acts of the defendants to the Landore Colliery, and that they might be restrained from making the drift or communication from the Pentre Colliery to the Cae Grobos Colliery, and from making any new or other adits, ways, passages or communications between the said several collieries, or any of them, and the Landore Colliery and works for the purpose of letting, or so as to let, down such water into the Landore Colliery and works, and generally from doing any acts, and from digging their [*346] said mines in any *places which might injure or endanger the coal-mines of the plaintiffs.

Upon a motion being made for the injunction before the Vice-Chancellor of England, on the 16th of January, 1846, it was ordered that the defendants, their servants, &c., be restrained from doing any acts, and from digging and working their said coal-mines in any places which might injure or endanger the plaintiff's mines, until the defendants should fully answer the plaintiff's bill, or the court make other order to the contrary. This order was confirmed by Lord Lyndhurst, on appeal.

The defendants put in their answers to the bill in the months of February and March, 1846. The defendant George Byng Morris, by his answer, said, that the Pentre and Drew's Pit Collieries were still valuable and working collieries, but the Landore Colliery was dormant and nearly worked out. He said, that between the Landore and Pentre Collieries there was a fault, which had dislocated the strata to such an extent, that the veins of coal in the Pentre Colliery were at that place twenty fathoms below the veins in the Landore Colliery, forming an impervious barrier between them, but that several years before an adit or

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drift had been formed through the fault under certain lands, called *Pwyl-y-wi*, belonging to other persons, from the six-foot vein on one side, to the three-foot vein on the other; that, in consequence of the plaintiffs having neglected to work the Landore engine, the waters in the Landore Colliery had collected and risen to the level of the adit under *Pwyl-y-wi*, and were discharging themselves on the Pentre Colliery, and when the excavations therein were filled up, there was reason to apprehend that the waters collecting in the adjoining collieries would rise *simultaneously, and speedily inundate Drew's [*347] Pit Colliery. The defendant denied that he had worked, but admitted that he had carried coal under the river Tawey from the Kilvey side up Drew's Pit, and stated that the right of the plaintiff to tolls as alleged by the bill was disputed, and under litigation. The defendant admitted that he had worked upwards from the Pentre Colliery, and made excavations into the Cae Grobus coal for the purpose of more effectually working the upper part of the Pentre Colliery lying under the lands called Cae Grobos, and said, that he had, in fact completed the communication between the lower and upper part of the Pentre Colliery before the bill was filed. The defendant said, that, although by effecting such communication, the stock of water situated to the dip of the Cae Grobos lands might find its way through the Pentre Colliery to the Cwm Pit engine, and have to be raised to the surface by the Landore engine, yet he believed that letting down such water would not be and had not been a manifest injury to the plaintiff, as alleged by the bill.

Evidence was gone into on both sides, and the cause now came on to be heard.

Mr. *W. M. James* and Mr. *Dumergue*, for the plaintiffs.

Mr. *Walpole* and Mr. *Rasch*, for the defendant George Byng Morris.

Mr. *Toller*, for Sir John Morris.

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The only cases referred to in the argument were *Acton v. Blundell*,^(a) *Whittingham v. Wooler*.^(b)

[*348] *VICE-CHANCELLOR, after going through the principal facts, and stating the allegations in the amended bill, proceeded :—

The original bill, in addition to the complaint I have mentioned, stated, that the defendant had broken through the bounds of his colliery and coal-works, in a pit called Drew's Pit, and had for some time then past, worked under the bed and soil of the River Tawey, belonging to the plaintiffs. And the bill alleging that to be an injury, also asked an injunction in respect of that, as well as in respect of the alleged injury to be apprehended from uniting the Pentre and Cae Grobos Collieries by means of the drift. The amended bill retains many of the original allegations respecting the breaking of the boundary between the Drew's Pit Colliery and the river Tawey; but the prayer of the bill has been amended by striking out so much of the prayer of the original bill as asked, "that the defendants might be restrained from working or digging coal under the river; and keeping open or using the existing passages or communications through the soil and ground of the river, and under the same, and from conveying coal through the same from the eastern or Kilvey side of the river." [His Honor stated the prayer of the amended bill.] As I am now about to dispose only of the case for the injunction, I may consider the bill as confined exclusively to that part of the prayer which relates in terms to the drift or communication between the Pentre and Cae Grobos Collieries.

Upon the motion for the injunction, an order was made by the Vice-Chancellor of England, restraining the defendants from doing any acts and from digging and working their coal-mines, in any places which might injure or endanger the plaintiff's mines, until answer or further order. This order was [*349] made the subject of *appeal, and was confirmed by Lord Lyndhurst. The injunction has ever since been con-

(a) 12 M. & W. 324.

(b) 2 Swanst. 428.

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tinued, and is still in force. It will be observed that the order granting the injunction does not put the plaintiffs to establish their rights at law, by action or otherwise,—a course which, in a case like this, the present Lord Chancellor would, I apprehend, have required as a matter of course. The only point of view, however, in which it is necessary for me to notice that circumstance, is this,—that the case cannot be affected by the decision of Lord Langdale, confirmed by the Lord Chancellor, in *Bacon v. Jones*.^(a) If a trial at law be necessary to establish the plaintiff's right to an injunction, the opportunity of so establishing it must be given to him now. I agree with the observation made on behalf of the defendants in the present suit, that the authority of the order of Lord Eldon, in 1805, as a precedent, is weakened by the circumstance, that it contains provisions for referring the matters in dispute, which could scarcely have been found in the order without the consent or acquiescence of the parties.

The admitted status of the mines in point of natural drainage, is this: the Landore engine is at a point lower than the Pentre and Cae Grobos workings; the water from Cae Grobos will naturally flow down to Pentre, and thence the waters of Cae Grobus and Pentre will naturally flow down to the Landore engine, or to the Cwm Pit engine. The Cwm Pit engine is at a level considerably below that of Landore. The Cwm engine throws up the water to Landore, and the Landore engine throws it to the surface; and it is clear, that, if the water is free to flow where the dips of the strata would carry it, the Duke, or his lessees, will have thrown upon *them the onus of relieving (by means of [*350] the Landore and Cwm engines) the defendants' Pentre and Cae Grobos mines, as a condition of relieving their own. Since the expiration of his lease of the Landore Colliery, in March, 1845, it appears that the defendant, by licence from the Duke, has had the use of the engines.

The case of the defendants (as I understand it) is not a traverse of the fact, that a drift or communication has at some time been made between the Pentre and Cae Grobos coal; nor a traverse

(a) 4 Myl. & Cr. 433.

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of the fact, that, by reason of such drift or communication, the water from the Cae Grobos coal is carried into the Pentre Colliery; nor that the water, both of the Pentre and Cae Grobos Collieries, is carried, either directly or indirectly, to the Landore engine. The defendants' case (as I understand it) is that no additional quantity of water is, by reason of that drift or communication, carried either directly or indirectly to the Landore engine, than was carried there by other channels before the late drift or communication between Pentre and Cae Grobos was opened; and whether that be so or not, that the defendants have a right so to work their mines as they are now doing; and that the damage (if any) thereby sustained by the plaintiffs is not in law an injury. It has also been insisted that the case has not been altered since the bill was filed. That may be so; but it does not follow that at the hearing the plaintiffs may not be entitled to the injunction.

I think, upon the case and evidence before me, the proper order is to retain the bill, and give liberty to the plaintiffs to bring an action. Upon the trial of the action, the defendants ought to admit that a drift or communication has been opened by them between the coal in lease from Sir William [*351] Mansell and the coal *under Cae Grobos; and that water in Cae Grobos is by such drift or communication carried into Pentre; and that the water from Pentre and Cae Grobos flows either to the Cwm or Landore engine. The injunction must be continued in the meantime.

Ordered, that the plaintiffs' bill be dismissed as against the defendant Sir John Morris, with costs, &c. And as to the defendant George Byng Morris ordered, that the plaintiffs' bill be retained for twelve months, with liberty for the plaintiffs, or either of them, to bring such action or actions as they, or either of them, may be advised, and proceed to trial thereon. And it is ordered, that the injunction issued in this cause be in the meantime continued. And in case the plaintiffs, or either of them, shall proceed to trial as aforesaid, within the time aforesaid, then the defendant George Byng Morris is, on the trial thereof, to admit that a drift or communication has been opened by him between coal under Pentre and coal under Cae Grobos, in the pleadings mentioned, *and that water in Cae Grobos is by such drift or communication carried into Pentre, and that the water from Pentre flows either to the*

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plaintiffs' Own Pit engine or to the plaintiffs' Landore engine, (a) in &c. And in case the plaintiffs, or either of them, shall bring such action or actions, and proceed to trial thereon within the time aforesaid, &c. further directions and costs reserved (except as aforesaid) until after the trial of the said actions. But in case the plaintiffs, or either of them, shall not proceed to trial in such action or actions within the time aforesaid, the plaintiffs' bill to stand dismissed, &c., with costs. Liberty to apply.

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1847: 6th and 10th November.

To a bill by a husband, claiming, in his marital right against his wife and the trustees of their marriage settlement, part of the furniture of a house which was let furnished at an entire rent, the whole of which had, from the time of the marriage, been received by the wife for her separate use, and seeking to have the rent apportioned; the answer of the wife set up a parol agreement, by the husband, made before the marriage, that the wife should possess the furniture in question for her separate use, although it was not included in the marriage settlement:—*Held*, that the plaintiff had no equity to sustain a suit for an account of an apportioned part of the past rents.

That the plaintiff had no equity to sustain a suit for the apportionment of the rent of the house and furniture, in respect of his alleged interest in the latter, unless it appeared that he was by some reason precluded from bringing his action at law to recover the furniture which he claimed; and that the plaintiff not having shown that he had no remedy at law, the bill must be dismissed.

Although a parol agreement, before marriage, that particular chattels of the wife shall be possessed by her for her separate use, is not binding upon the husband; yet, if the agreement be acted upon by the chattels being placed under the dominion of the trustees, and treated as separate property, the agreement may be made effectual.

Household furniture does not pass under the description of "fixtures and fittings-up."

Considerations which influence the Court in directing inquiries at the hearing of a cause to perfect the evidence on behalf of the plaintiff; and distinction where the inquiries are sought to show that the plaintiff is entitled to relief in the suit, and where the title to some relief being proved, the inquiries are to be directed only to the measure of that relief.

By a settlement made in October, 1842, prior to the marriage

(a) The decree was varied by the Lord Chancellor, on appeal, 21st July, 1848, by omitting the directions distinguished above by italics. See 2 Phill. 683.

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of the plaintiff and the defendant, his wife, certain property belonging to the defendant, consisting, among other things, of a leasehold house, No. 3, Wilton-street, Grosvenor-place, was assigned to trustees, upon trust for the wife for her life, for her separate use. The description of the property comprehended the house in Wilton-street, "together with the fixtures and fittings up." The house, either prior to or soon after the execution of the settlement, was in the occupation of Mr. Grieve, a tenant, to whom it was let furnished. Part of the furniture in the house had been provided by the defendant Rogers, one of the trustees, and the other part of the furniture was the subject of this suit.

The house in Wilton-street was let furnished at the rent of 300*l* a year, of which it appeared that a sum of 40*l* a year was, under an arrangement to which all parties assented, paid to Rogers for the use of the furniture which he had provided, and the remainder was received by the wife with the consent of the trustees of the settlement. A short time after the marriage of the plaintiff and defendant, differences arose between them, and a separation took place. The bill was filed [*353] *in March, 1846, by the husband against the wife and the trustees. The bill alleged, that, besides the "fixtures and fittings up" mentioned in the settlement, the furniture and tenant's fixtures in the house in Wilton-street (other than the furniture which belonged to the trustees) were, prior to the marriage, the property of the wife, and that, therefore, they became, upon the marriage, the property of the plaintiff in his marital right. The bill alleged, that, by reason of the demise of the house and furniture to the tenant having been made with the concurrence of the plaintiff, and at one entire rent, he (the plaintiff) had no remedy at law to recover either the furniture which he claimed, or any portion of the rent in respect thereof: that the defendants, the wife and trustees, had frequently threatened to determine the tenancy under which the property was occupied, and then to sell the furniture. The bill prayed a declaration by the Court that the fixtures and furniture referred to were not comprised in the marriage settlement; that the plain-

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tiff was, in right of his wife, entitled to the same, subject to the demise thereof to the tenant; and that he was entitled to a proportionate part of the rent in respect of such fixtures and furniture; and the bill prayed that such apportionment might be made accordingly, as well for the time past since the marriage, as for the time to come; that an account might be taken of the rent which had accrued in respect of the plaintiff's portion of the furniture and fixtures, and the amount thereof paid to the plaintiff, and that such apportioned part of the rent might be paid to the plaintiff for the future. The bill also prayed an injunction to restrain the defendant from parting with the furniture and fixtures in question, and for a receiver.

The answer of the wife denied that there were any *fixtures in the house, except those which passed by the [*354] settlement. She admitted that certain articles of furniture in the house were not comprised in the settlement; but she alleged that, upon the treaty for the marriage, it had been intended, both by herself and the plaintiff, that the whole of her property, including the articles in question, should be included in the settlement: that these articles were inserted in the draft; but on such draft being produced to the plaintiff, he objected to the length of the schedules on the ground of expense: that the plaintiff then promised and agreed that, if the furniture were omitted from the schedule, she (the defendant) should still be entitled thereto, for her separate use, and that the articles were struck out of the draft settlement upon the faith of such agreement. The defendant further stated, that, after this agreement had been made, the house was let, together with the fixtures, furniture, and effects, at an entire rent: that such demise was made by reason of the defendant being entitled for her separate use, as well to the articles in question as to the house; and that the plaintiff, although not a party to, yet concurred in, and consented to the demise. The defendant said that, when irritated by the plaintiff, she might (though she had not recollection thereof) have threatened to sell the furniture and effects; but that she had no actual intention of so doing. The trustees denied any such threat or intention.

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The result of the evidence, as it affected the decision of the Court, is stated in the judgment.

Mr. *Romilly* and Mr. *E. Montagu*, for the plaintiff.

Mr. *Rolt* and Mr. *Bichner*, for the defendant the wife, argued, first, that, even upon the case which the plaintiff made, [*355] *he had no equity to sustain the suit. The plaintiff claimed certain specific chattels in the actual or virtual possession of the defendants, or of their tenant, which formed a case for an action of trover, and not for a bill. The right asserted by the bill was wholly a legal right. Secondly, the case was disproved in point of fact, for the property in question might be well considered as comprised in the words "fixtures and fittings-up," and, if not, it appeared by the answer and the evidence that the actual introduction of the property by a detailed specification in the schedule to the settlement was only prevented by the promise of the plaintiff that the property should be treated as if it had been specifically included. This was an agreement to which the Court would give effect, though it was not expressed in any writing. It was like the case in which an act was done on the faith of a parol promise, and the Court enforced the performance of the promise: *Chamberlain v. Agar*.(a) Assuming that the settlement did not expressly comprehend the whole of the fixtures and furniture in the house, there was certainly no sufficient evidence before the Court to show what articles were included, or what part of the existing furniture and fixtures were excluded; and the plaintiff, therefore, had not proved a case upon which any decree of the Court could be founded.

Mr. *Romilly*, in reply.—The attempt to set up a parol agreement for the purpose of depriving the husband of the property which he has acquired in his marital right has not only failed in evidence, but such an agreement, if it had been made, would have been invalid within the Statute of Frauds. The settled and

(a) 2 Ves. & B. 259.

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unsettled property were let together, with the consent *of the plaintiff, and at law the trustees would be re- [*356] garded as the agents of the plaintiff for that purpose, which would preclude him from bringing trover. Even if the plaintiff were in a condition to sustain an action at law against the trustees or their tenant, why should he be driven to a course of proceeding which would be prejudicial to the whole property? The existing disposition of the property rendered it productive, and the remedy which the plaintiff asked was the apportionment and not the destruction of the profit. The very circumstance that the only legal right which the plaintiff could assert would have the effect of putting an end to the beneficial letting of the property, was a reason for equitable interference to apportion the rent. The account of what was due to the plaintiff for the past rent of the property was of course, whether the right was legal or equitable.

Mr. *Malins* and Mr. *Barber* appeared for the other parties.

Nov. 10.—VICE-CHANCELLOR (after stating the allegations of the bill, and the defence raised by the answer, with respect to the parol agreement):—

The defendant Mrs. *Simmons* says that the demise of the house, together with the fixtures, furniture, and effects, was made at one entire rent, with the concurrence and consent of the plaintiff, though he was not a party thereto. This is not denied, and the evidence shows that the trustees acted upon the supposition that the furniture and effects were the property of the wife, and authorized her to receive the whole of the rent.

*The deposition of the daughter of Mrs. *Simmons*, to [*357] the extent to which it goes, proves that something of that which is alleged by the answer did take place with respect to the household furniture and effects. It does not, however, appear, either upon the pleadings or from the evidence, what was the nature of the demise. No instrument or evidence upon that point has been produced.

I stated, at the conclusion of the argument, that no case was

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made for the interference of the Court simply in order to protect the property. The defendants deny any intention to convert the property. I expressed an opinion also, and to that opinion I still adhere, that, upon the fact that the husband authorized the letting, and allowed the wife to receive the rents, it was impossible to charge or have an account against the wife in respect of the past rents at the time the bill was filed. The question then remains, whether the plaintiff is not entitled to have an apportionment of the rent in respect of the furniture and effects which he claims. It was argued that the whole of the furniture and effects is, in fact, comprised within the express words of the settlement; but it appears to me to be clear that the furniture and effects (if any) comprised in the lease to Mr. Grieve were not comprised in the marriage settlement under the words "fixtures and fittings-up." Those words do not naturally include household furniture and effects; and, in fact, the case upon the pleadings is, not that the furniture and effects were comprised in, but that they were purposely omitted from the settlement to save expense. Whether the marriage settlement included all the fixtures in the house which were comprised in the demise to Grieve, is a point as to which I had not then, as I have not now, information whereupon I could safely form a conclusive opinion, [*358] although it appears to me it would be difficult to exclude any fixtures or fittings-up.

In this state of the case, the utmost the plaintiff could ask of the Court would be an inquiry what fixtures (if any) other than those comprised in the marriage settlement, and what household furniture and effects, were comprised in the lease to Grieve, and what parts of such furniture and effects were the property of the lady at the time of the marriage, and what parts thereof belong to Rogers; and in addition to this, an inquiry as to the furniture said to have been since added by the defendant by way of substitution for furniture worn out, might be necessary for her benefit,

But the first question is, has the plaintiff laid a foundation for such an inquiry? I agree with the plaintiff's argument, that the fixtures (if any,) and the household furniture and effects

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claimed by him, would, by the marriage, according to his representation, have become his property, *jure mariti*, if nothing had occurred to alter such right. And I have not heard any argument on the part of the wife to satisfy me that the parol agreement alleged by her answer to have been come to between her and the plaintiff before the marriage, relating to the same fixtures, furniture, and effects, would (if nothing more had passed) have enabled her successfully to have claimed the same in the hands of the plaintiff. But if the plaintiff (assuming that the marriage alone would have given him the property in dispute) did, as the answer of the wife suggests, come to such agreement with her as she alleges, and did, in pursuance of such agreement, authorize the trustees of the settlement to deal with the articles which were the subject of it as her property, by demising it with the house at an entire rent, and paying such rent to her, and if the *trustees have acted upon [*359] that authority, it by no means follows from the rights given to the plaintiff by the marriage alone, that he can disturb the arrangement which he thus sanctioned, at all events during the demise. Admitting that the parol agreement would not be binding, yet if the parties voluntarily place the property under the dominion of the trustees as part of the property subject to the trust, the case is very different from that of an agreement which had never been acted upon. If, as stated at the bar, the demise originally sanctioned by the plaintiff has expired, and the tenant now holds under a new demise not sanctioned by the plaintiff, and by which he is not bound, I do not know what there is necessarily to prevent the plaintiff from trying his right to the fixtures, household furniture, and effects in dispute by an action at law.

It is not, however, necessary, nor do I mean to give any opinion as to what the state of the case is; the question which I have to consider is this—what is the case alleged and proved by the plaintiff? The least that he should have proved, in order to entitle himself to the inquiry I have suggested, is that there was property of his wife, at the time of the marriage, not included in the marriage settlement, and that such property is

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so circumstanced that he cannot recover it at law. Now the only attempt the plaintiff, has made to give evidence of his claim has been by reading a passage from the answer of a married woman, which passage, (if it be evidence against the married woman,) so far from giving him a prima facie case for the relief he asks, is consistent with the supposition that the plaintiff has his remedy at law, unless, indeed, he has parted with it in the way suggested by the answer, by authorizing the trustees to deal with the property he claims as the property of Mrs. [*360] Glenton. *The inquiry, therefore, which he must now ask of the Court is, not the simple inquiry which I first suggested, but a preliminary inquiry to show whether he is entitled to that simple inquiry.

Looking at the answer of the wife, and the evidence read on her behalf, and the absence of evidence on the part of the plaintiff, it appears to me that this is a case in which I am not called upon to give the plaintiff any relief to which he has not strictly entitled himself by the facts he has alleged and proved. I make no doubt that, as in the case of *Marten v. Wichelo*,^(a) the question whether the Court should leave a party strictly to the case he has put upon the pleadings, or enable him by inquiries, or by the admission of the defendant to prove the case, is one on which the discretion of the Court should, in a great degree, be governed by its view of the fairness or moral propriety of the suit.

I think the plaintiff has not made out a case entitling him to relief, and that his bill must, therefore, be dismissed with costs. This decree is to be without prejudice to any claim he may think fit to make in any other suit or proceeding.

(a) Cr. & Ph. 257.

1847.—Hunt v. Peacock.

*HUNT v. PEACOCK

[*361]

1847: 29th June. 1848: 17th and 22d February.

To a suit by three out of four residuary legatees, to recover three-fourths of a sum of stock which the executors had omitted to get in, and which had been transferred to the Commissioners for the Reduction of the National Debt, under the statute 56 Geo. 3, c. 60, the legatee entitled to the other fourth part of the stock is a necessary party.

The proper form of proceeding to recover stock and dividends, unclaimed for ten years, and carried over to the account of the Commissioners for the Reduction of the National Debt, under the statute 56 Geo. 3, c. 60, is, by petition to be served upon the Attorney-general and the Commissioner, and not by bill in the first instance; and if there be conflicting claims to the fund, the Court will then give directions for the trial of the rights of the parties between themselves, either by suit or otherwise.

ELIZABETH STACEY, by her will, dated in January, 1801, after reciting that she was possessed of sundry leasehold houses in Goswell-street, 300*l.* in the funds, 3 per cent. reduced, furniture, plate, &c., desired that the same (excepting the stock) might be disposed of by auction, and the amount invested in the names of her executors, for the benefit of her son, William Stacey, and for his sole use, if he survived her (the testatrix) three years; "but if no application" from him, then her will was, that the said property should be shared, share and share alike, between Ann Townsend "separate for herself," Thomas Hunt, John Hookway, and Thomas Hosegrove, "but if any demise, the property to be divided amongst the survivors:" and the testatrix appointed Thomas Woolcot and William Andrews executors of her will. The testatrix died the same year, leaving Hosegrove, Ann Townsend, Hunt, and Hookway surviving, the three last being also stated to be her next of kin. The executors proved the will, and executed the trusts, except that they omitted to obtain a transfer of the 300*l.* stock; and that sum, with the dividends from the death of the testatrix, remained standing in her name unclaimed until 1811, when the stock and the accumula-

 1847.—Hunt v. Peacock.

tions were, according to the statute,(a) transferred to the account of the Commissioners for the reduction of the National Debt.

The bill was filed in November, 1846, by Elizabeth [*362] *Hunt, the administratrix of Thomas Hunt, and also of

Hookway and Hosegrove, against Mary Peacock, the executrix of the last survivor of the executors of the testatrix, and also against the Attorney-General and the Commissioners for the Reduction of the National Debt, for a transfer of three fourth parts of the 300*l.* stock and of the accumulated dividends. The bill stated that no claim had ever been made by William Stacey, the son, who had not been heard of for some years, or at any time since the death of the testatrix; and that, having been born in 1762, he had long since died, and had no personal representative: that Ann Townsend died some years after the testatrix intestate, and had no personal representative; and that the Attorney-General, claimed an interest in the stock in the right of the Crown. Mary Peacock, by her answer, denied all knowledge of the trust. The Attorney-General and the Commissioners submitted, whether a suit was in such a case proper, or whether they ought to be defendants thereto; but all the defendants submitted to act as the Court should direct. No evidence was given other than the probate and letters of administration. At the hearing,

Mr. *Hallett*, for Mary Peacock, objected that a representative of Ann Townsend was a necessary party.

Mr. *Rolt* and Mr. *Hargrave*, for the plaintiff, relied upon the cases of *Smith v. Snow*(a) and *Perry v. Knott*,(b) the suit being for an aliquot part (three-fourths) of an ascertained trust fund, and not a suit for administration, or in which an account was necessary to be taken.

Mr. *Hallett* said that *Smith v. Snow* had not been approv-

(a) 56 Geo. 3, c. 60.

(b) 3 Madd. 10.

(c) 5 Beav. 293.

 1847.—Hunt v. Peacock.

ed *of; *Hutchinson v. Townsend*; (a) and the Lord [*363] Chancellor had disapproved of *Perry v. Knott* on this point: *Lenaghan v. Smith*. (b)

Mr. *Wray*, for the other defendants.

The VICE-CHANCELLOR held, that a representative of Ann Townsend was a necessary party to the suit; and the cause was ordered to stand over, with liberty to amend, &c.

The plaintiff obtained letters of administration of the estate of Ann Townsend, and filed her supplemental bill.

1848: Feb. 22.—Mr. *Rolt* and Mr. *Hargrave*, for the plaintiff.

Mr. *Wray*, for the Attorney-General and the Commissioners, objected that the plaintiff ought to have proceeded by petition, serving such petition upon them, according to the statute, and ought not to have made them defendants to a bill.

Mr. *Rolt*, in reply.—The statute does not, by giving a remedy by petition, take away the right to sue in this court in the ordinary way. If it be said that no other proceeding than by petition can be adopted, because that alone is mentioned in the act, it must be contended, that, if a proceeding by petition had not been given, the remedy would have been altogether lost, and the stock would have become the absolute property of the Commissioners. In *Ex parte Lavell*, (c) the parties were put *to file their bill; and if a suit be necessary, the per- [*364] sons, in whose names the fund stands, must be necessary parties, or no transfer can be directed: *Ex parte Gillett*. (d)

VICE-CHANCELLOR:—The Commissioners for the Reduction of the National Debt, who have been made defendants in this

(a) 2 Keen, 675.

(b) 2 Phill. 301.

(c) 2 J. & W. 397.

(d) 3 Madd. 28.

1848.—Hunt v. Peacock.

case, submit, by their answer, whether they should properly be parties to the bill, and whether the Court will exercise jurisdiction against them in such a suit. In order to raise this objection, the better course would have been for the Commissioners to have demurred to the bill, whereby the expense of prosecuting the suit against them to the hearing might have been avoided. The only cases upon this subject are *Ex parte Lavell* and *Ex parte Gillett*. In the former case, the Court refused to transfer the fund upon petition,—the title of the petitioners being disputed,—and said it was not the intention of the act that the right should be determined upon petition between parties claiming adversely. In that case, the Court, therefore, would not direct a transfer upon petition, but required a bill to be filed, and the petition stood over. I infer from that case, that, the petition being regular as against the Attorney-General and the Commissioners, if it become necessary to litigate the question between the parties, the Court will direct them to take proceedings for determining between themselves their conflicting claims. In *Ex parte Gillett*, two petitions were filed by parties claiming to be entitled to the fund. The Court did not make an order in a summary way, but ordered that the fund should be brought into Court, [*365] and directed inquiries *for the purpose of ascertaining in whom the title was vested.

The conclusion which I draw from those cases is, that the proper course is not to file a bill in the first instance against the Attorney-General and Commissioners. By the statute, authority is given to the bank to transfer the fund in such a case, if the governor shall be satisfied that the claim is just; but if the bank will not make the transfer, the parties should proceed by petition and serve the Attorney-General and the Commissioners with their petition, and when they are brought before the Court, an inquiry may (if necessary) be directed as in the case of co-defendants in a cause, or the Court may direct a bill to be filed, as in *Ex parte Lavell*, and order the petition to stand over. My opinion is, that the proper course is to proceed by petition.

As the dismissal of the bill would in the present case be attended with the loss of all the expense which has been incurred,

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and the objection is one which ought to have been taken earlier, it will be the most convenient and least expensive course to allow this suit to proceed.

The defendants the Commissioners for the Reduction of the National Debt having, by their answer, objected to their being made defendants, and, by their counsel, requesting that the plaintiff's bill be dismissed against them, dismiss the bill as against the said defendants with costs. Let the Master inquire whether Thomas Hunt, John Hookway, Thomas Hosegrove, and Ann Townsend are dead, and, if so, when they respectively died; and whether William Stacey is living or dead, and whether he has left any and what personal representative; and whether, since the death of the said testatrix, any and what application or claim was ever, and when, and by whom, and how, made from or by the said William Stacey, or on his behalf, to the executors of the will of the said testatrix, or either and which of them, for or in respect of the legacy bequeathed by the said will to the said William Stacey, if he should claim the same. And let the Master inquire who is entitled to the said sum of 300*l.* stock, and the dividends thereof. Liberty to state special circumstances. Let the Commissioners for the Reduction of the National Debt, together with the Attorney-general, be at liberty to attend before the Master upon such inquiries.

 *WILSON v. SHORT.

[*366]

1847: 4th, 5th, and 6th November. 1848: 13th January.

Brokers, in the city of London, being directed to purchase iron, delivered to the buyer bought notes, purporting to be notes of the contract for the iron, not disclosing the name of the seller, the brokers guaranteeing the performance of the contract; and the buyer paid the brokers their commission, together with a deposit in part payment of the price of the iron. The buyer afterwards discovered that there was no principal seller of the iron, other than one of the firm of brokers, who intended himself to perform the contract; and upon a bill filed by parties from whom the buyer of the iron had obtained money on the security of the contracts, the deposits were ordered to be repaid, with interest.

If in such a case the plaintiffs had, before the bill was filed, abandoned all interest in the contracts for the iron, they could not afterwards sue for the recovery of the deposits; but the cancellation of certain letters which gave the plaintiffs an interest in the contract as against the brokers, the plaintiffs being at the time of such cancellation ignorant, and the brokers knowing the truth of the case, does not in equity protect the brokers from the claim of the plaintiffs for the recovery of the deposits.

Though the Court will not enforce a contract for the purchase of a litigated right,

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yet if a lawful contract for the purchase of an undisputed right be made, and the necessity for litigation as against third persons arise out of circumstances afterwards discovered, the purchaser or assignee is not precluded from suing upon his contract. It is not champerty where the right purchased was originally clear, but the litigation is the result of circumstances subsequently arising or subsequently known.

If the plaintiffs had known that the brokers were also the sellers of the iron, or if the plaintiffs were otherwise not deceived by their representations, they would not have been entitled to relief in equity.

Knowledge by the buyer of the fact that there was not any seller of the iron other than the brokers, would not affect parties advancing money to the buyer on the faith of representations made to them by the brokers, that the contract was regular and valid, nor deprive such parties of their right of rescinding the transaction and recovering payments which had been made.

There is a remedy in equity as well as at law, by a principal against his broker or agent, to recover a sum of money paid to the broker on his untrue representation, that he had entered into a contract for his principal, which alleged contract had in fact no existence.

THE defendants Short and Mahony, who were brokers in the city of London, were, as such brokers, directed by [367] *the defendant Bright to purchase iron on his account, and, pursuant to such direction, they delivered to him bought notes to the effect that certain contracts for iron had been made, and he thereupon paid the brokers sums of money as deposits in part payment of the purchase-money, together with their brokerage, the brokers not disclosing the name of the seller, but guaranteeing the performance of the contract. It was afterwards discovered that there was in fact no seller of the iron, other than the brokers themselves; and the suit was brought by third persons, who had advanced money to the buyer on the security of the contract, against the brokers and the buyer, to recover from the brokers the amount of the deposits and interest. The defence was, first, on the question of fact, whether the plaintiffs did not know, when they lent their money, that the brokers were themselves the sellers of the iron; or, if not, whether the purchaser was not aware of that fact, assuming (which was denied) that the legal result of the purchaser's knowledge would be to affect the plaintiffs constructively with the same knowledge. If the defendants, the brokers, failed on the questions of fact, they then insisted,

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first, that before the bill was filed the plaintiffs had entered into a new agreement, by which they gave up all interest in the contract in question; or, if not, secondly, that, although the purchaser might assign to the plaintiffs the benefit of the contract, he could not assign a right to rescind or defeat the contract, or a right to recover from the brokers the deposit on the ground of fraud; thirdly, that, if the right might be assigned, there was no ground for the suit in equity, unless some impediment was shown to exist, which prevented the plaintiffs from bringing an action at law.

The effect of the evidence on the questions of fact is stated in the judgment more succinctly than it could be given in a form detached from the decision of the points of law.

Mr. Romilly, Mr. Bacon, and Mr. Hare, for the plaintiffs.—On the principal question, the liability of the defendants the brokers to refund the deposits on pretended contracts in which they were, without the knowledge of the other party, both principals and agents, they cited *Woodhouse v. Meredith*,^(a) *Gillett v. Pepper-corne*,^(b) and *Ex parte Dyster, Re Moline*;^(c) on the effect of the credit which the plaintiffs were justified in giving to the representations made by the brokers, as to the validity of the contract, whatever might have been the knowledge of Bright as to the transaction, *Evans v. Bickenell*,^(d) *Burrowes v. Lock*;^(e) on the effect of cancellation of the contract, as between the plaintiffs and the brokers, in ignorance by the former of the fraud complained of, *Crouse v. Ballard*;^(f) and on the jurisdiction of the court of equity as well as of a court of law, *Blair v. Bromley*.^(g)

Mr. Rolt, and Mr. Cole, for the defendants Short & Mahony, cited *Prosser v. Edmonds*^(h) in support of the argument that the right to sue for the recovery of the deposits could not be assigned;

(a) 1 J. & W. 204, 223.

(b) 3 Beav. 78, 83. See also *Benson v. Heathorn*, 1 Y. & C. C. C. 326.

(c) 1 Mer. 155.

(d) 6 Ves. 174.

(e) 10 Ves. 470.

(f) 3 Bro. C. C. 117.

(g) 5 Hare, 542.

(h) 1 Y. & C. 481.

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or that, if assignable, the remedy was at law : *Hammond v. Messenger*.(a)

Mr. *Morris*, for the defendant Bright.

[*369] *VICE-CHANCELLOR:—On the 18th March, 1845, the plaintiffs, Wilson and Craven, lent the defendant Bright 2000*l.*; and, to secure the repayment of this loan with interest, Bright assigned to the plaintiffs three contracts he had made for the purchase of iron. One of those contracts was made with persons trading under the firm of Robertson & Co., and is not involved in the question in the cause. The remaining two contracts were, in some sense and for some purposes, made between the defendant Bright and the defendants Short & Mahony. In fact, Short & Mahony say, that those two contracts were made with them to all intents and purposes, and that they have always been ready and willing to complete the same by delivering to Bright, or to whom he shall appoint, the iron they agreed (as they say) to sell to Bright, subject, as they contend, to an option on their part to have it declared that Bright forfeited his right to the performance of the contract. But the object of the present suit is not to enforce the contracts in question, or either of them, but to rescind both, and recover back payments made by Bright under the name of deposits; and the question is, whether the plaintiffs are entitled to such relief.

The case I have to try is this:—the defendants Short & Mahony were, at the time of the transactions which resulted in the suit, partners as brokers in the city of London, and were employed in that character by the third defendant Bright in divers speculations in iron in which he was concerned.

Early in February, 1845, Short & Mahony purchased for and by order of Bright 500 tons of Scotch pig iron, upon which 250*l.* was paid as a deposit, according to the allegations

[*370] *in the bill, to be handed by the brokers to the seller;

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and Bright, according to the bill, paid the brokers their commission and brokerage in respect of that purchase.

On the 14th February, 1845, Bright directed Short & Mahony to buy for him 1000 tons of iron; and, accordingly, Short & Mahony delivered to Bright a bought note in these words:—

“No. 3791.

“*London 14th February, 1845.*

“Bought for John Bright, Esq., 1000 tons Scotch pig iron, at 4*l*. 5*s*. per ton, delivered at Glasgow, cash without discount on delivery of each parcel. Prompt, six months, adding legal interest, at 5*l*. per cent. per annum, from the 9th day of June next. Deposit 500*l*. in cash, forthwith to be paid by the buyer. Short & Mahony 1-2 per cent. brokerage.

(Signed)

“SHORT & MAHONY.”

On the 11th of March following, Bright authorized Short & Mahony to purchase for him a further quantity of 2000 tons of iron, and on the same day Short & Mahony delivered to Bright a bought note of the purchase, as follows:—

“No. 4842.

“*London 11th March, 1845.*

“Bought for account of John Bright, Esq., 2000 tons of Scotch pig iron at 5*l*. 10*s*. per ton, free on board at Glasgow, net cash without discount. Deposit of 1*l*. per ton to be paid forthwith. Prompt on 1000 tons, 30th June; ditto on 1000, 31st July. Short & Mahony brokerage 1-2 per cent.

(Signed)

“SHORT & MAHONY.”

The contracts of the 14th February and 11th March, 1845, are the two contracts respecting which the questions in this *cause have arisen. It will be observed that in neither of [371] the bought notes is the name of the seller or alleged seller disclosed. However, Bright paid to Short & Mahony 500*l*. by way of deposit under the contract of the 14th February, 1845, and 2000*l*. under that of the 11th March, 1845, and also their brokerage in respect of both contracts. At the time of the plaintiffs' loan to Bright, Mr. Barrett, a witness for the plaintiffs in the cause, was

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Bright's solicitor, and he is a witness for the plaintiffs in the cause. I may observe in passing, that when the case was opened an objection was taken that Barrett ought to be a party in the cause. This objection I had no hesitation in overruling, but I reserved the question whether it might not be proper to ascertain by inquiry whether Barrett had not a direct interest in the plaintiffs' success in the suit; for, although such interest would not, as the law now is, disqualify him as a witness, it might affect the credit due to his testimony. I am, however, quite satisfied that the conclusion to which I have come does not require that I should take any such precaution.

Before the plaintiffs actually advanced their money to Bright, they required Barrett to ascertain by inquiry from Short & Mahony, whether they, the plaintiffs, might safely rely upon the due performance of the contracts. This Barrett did, and obtained from Short & Mahony an account of their brokerage in respect of both contracts, and a receipt for 76*l.* 5*s.*, the amount of such brokerage; and Short & Mahony also wrote upon each of the bought notes, above their signatures, the following words:—"In consideration of our brokerage of 1-2 per cent., which we have received, we hereby guarantee the due fulfilment of this contract on 'the part of the sellers.'" Bright further gave to the plaintiffs a letter, as follows:—

[*372]

"**London, 18th March, 1845.*

"Mr. John Craven, Mr. Wilson.

"SIRS,—I hereby beg to hand you three contracts for the purchase of 500, 1000, and 2000 tons of Scotch pig iron, at 75*s.*, 85*s.*, and 110*s.* respectively, net cash, free on board at Glasgow, deliverable as follows:—the first parcel of 500 tons to be delivered as the buyer may require, during six months from the 8th February last, but not more than 250 tons in any one month. The second parcel of 1000 tons at six months from the 14th February last, adding legal interest at 5*l.* per cent. per annum from the 9th June next. The third parcel of 2000 tons to be delivered, 1000 tons on the 30th June next, and the remaining 1000 on the 31st July next. Upon these three parcels I have paid de-

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posits to the amount of 250*l.*, 500*l.*, and 2000*l.* respectively, the receipts for which and the receipt for the payment of the brokerage are herewith handed to you. The first parcel has been purchased of Messrs. James Robertson & Co.; the last have been guaranteed the due fulfilment of by Messrs. Short & Mahony, which is likewise handed over to you. Now in consideration of 2000*l.* this day advanced by you to me on the security of the said three contracts and the several deposits paid in respect of the same, I hereby hand over and transfer to you all benefit and advantage to be derived from the said contracts and each and every of them, for and as a security for the repayment of the said sum of 2000*l.*, and a bonus of 200*l.* thereon. And I hereby authorize and empower you, in case I do not pay the amount of the several prompts as they become due, or otherwise arrange the said prompts to your satisfaction ten days previously to the respective prompt day, then on such tenth day previously to such prompt day accruing as aforesaid to make sale and dispose of the said three parcels of iron at the best price that you can obtain either by public sale or by private contract on or after *that day, without any further authority from me in [*373] respect thereof, and out of the net proceeds arising therefrom, first to repay yourself the said sum of 2000*l.* and 200*l.* respectively, and all expenses attending such sale or sales, and then to hand over the surplus to me.

"I am, &c.,

JOHN BRIGHT."

Bright also delivered to the plaintiffs the following letter addressed to Short & Mahony:—

"*London, 18th March, 1845.*

"GENTLEMEN,—I beg to inform you that I have this day transferred to Mr. John Craven and Mr. William Wilson (the bearers hereof) my contracts for 1000 and 2000 tons of Scotch pig iron purchased by me through you, dated the 14th February and 11th March last, together with all benefit to be derived therefrom, and from the deposits of 500*l.* and 2000*l.* paid by me in

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respect thereof: and I hereby request that you will hold the same and the said deposits on their account.

"I am, &c.,

JOHN BRIGHT."

"Newman's Court, Cornhill.

On the same day the plaintiffs delivered the last letter to Short & Mahony, inclosed in the following letter from themselves:—

"London, 18th March, 1845.

"GENTLEMEN,—We beg to inclose a letter of this date from Mr. John Bright, and shall feel obliged by your acknowledging the receipt thereof, and that you hold the 1000 and 2000 tons of iron and deposits of 500*l.* and 2000*l.* respectively on our account.

"We are, &c.,

JOHN CRAVEN, WILLIAM WILSON."

Short & Mahony thereupon wrote to the plaintiffs as follows:—

[*374]

**"London, 18th March, 1845.*

"Mr. John Craven, Mr. William Wilson.

"GENTLEMEN,—We beg to acknowledge the receipt of your letter of this date, inclosing one from Mr. John Bright also dated to-day; and in reply thereto beg to say, that on behalf of the seller of 1000 and 2000 tons of iron, and the deposit of 500*l.* and 2000*l.* respectively therein referred to, we hold the same to your order in compliance therewith.

"We are, &c.,

SHORT & MAHONY."

Immediately after the loan by the plaintiffs to Bright, a fall took place in the price of iron, and a difficulty arose in providing money for payments of prompts or balance of the purchase money. In consequence of this, a meeting took place on the 6th June, 1845, at the office of Short & Mahony, at which meeting were present the plaintiffs, Bright, Short & Mahony, and Barrett. It is not in dispute that at that meeting the plaintiffs agreed that the letter of the 18th March, 1845, written by them to Short & Mahony, and the letter of the same date from Short & Mahony to the plaintiffs, should be cancelled, and that this in

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substance and effect was done. One of the questions in dispute in the suit, however, is as to the intention and effect of that transaction. The plaintiffs insisted that the intention and effect of the transaction was only to give Short & Mahony or any other person paying the prompts, priority over the plaintiffs, in respect of the prompts to be paid, and to leave the contracts as between themselves and Bright untouched. Short & Mahony, on the other hand, contend that the intention and effect of the transaction was to put an end to the plaintiffs' interest in the iron altogether. Upon this controversy I shall presently state my opinion.

Now the truth is, that in neither of the contracts in *question was there any real seller; and so far as the [*375] bought notes, or any other acts or statements of Short & Mahony, may have represented that there was a real seller, such representation was not in accordance with the facts, and was, in the contemplation of this Court, and I apprehend of a court of law also, a fraud upon Bright, unless it could be shown that Bright knew the truth and was not deceived by the representation. In fact, in both contracts Short & Mahony intended that Short, or the firm of Short & Mahoney, should supply the iron to be delivered to Bright under the contracts. This fact was communicated to the plaintiffs soon after the meeting of the 6th of June. The price of iron continued to fall; and the bill was filed on the 21st of October following, to recover the 500*l.* and 2000*l.* and interest from Short & Mahony, and the excess of the plaintiffs' debt (if any) from Bright.

The case made by the defendants (generally stated) was this,—that Bright was a speculator in iron, but not a person in credit in the City of London sufficient to enable him to carry on his operations on a scale large enough to satisfy him; and that Short, being a friend of Bright and desirous to assist him, did occasionally, for himself and his firm, consent to undertake the fulfilment of contracts for the sale of iron to him, in which transactions it was well understood, between Bright and Short & Mahony, that there were no real sellers, other than Short & Mahony; but inasmuch as Short & Mahony were city brokers, it was necessary,

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in point of form, to represent on the face of the bought notes that there were sellers other than themselves. The answer of Short & Mahony suggests that the contracts of February and March, 1845, were of this character, and that Bright and the plaintiffs so understood it. Bright, however, by 'his [*376] answer, alleges that he and the *plaintiffs all acted in the belief that there was a bona fide seller, and that Short & Mahony had only acted in their capacity of, and according to their duty as, brokers in the transaction.

If this were a bill to enforce the contracts, and the only question I had to decide was, what are the rights of the plaintiffs as against both Bright and Short & Mahony, so far as those rights are evidenced by the bought notes of the 14th of February, 1845, and the 11th March, 1845, the accounts of and receipts for the brokerage, the guarantee given by Short & Mahony, the letters of the 18th of March, and Bright's security to the plaintiffs, coupled with the undisputed fact that there was no real seller—if this were the only case before me, no difficulty could, I think, exist in making a decision in the plaintiff's favor. I shall assume this, and confine my observations to the points which were made by way of answer to that *prima facie* case.

The first point I shall consider is that which, if established, would displace the plaintiffs' claim altogether; namely, that the plaintiffs, before they advanced their money to Bright, had distinct notice that the only person liable to Bright for the performance and fulfilment of the contracts in question was the defendant Short, or his firm of Short & Mahony,—that there was no third person who had become responsible to him (Bright) for the sale of the iron, and that the sums paid in respect of the deposits for the iron, comprised in the same two contracts, were in the hands of Short & Mahony, which the defendants say would not have been the case if the sellers had been third parties. The onus of proving this is clearly on the defendants Short & Mahony. The bought notes, according to their natural import, represent that there were sellers of the iron other than [*377] *Short & Mahony. The account rendered by Short & Mahony of their brokerage charges on the two contracts

in question, and their receipt for the same, represent the same thing; so does the guarantee; so also do the letters of the 18th March; and I can discover nothing in evidence in this cause sufficient to countervail the plain effect of this documentary evidence, as between the plaintiffs and Short & Mahony. Where, indeed, A. sells to B. property which belongs to C., it may be right, as between B. and C., to hold that any general representation made to B., which would have put a cautious man upon an inquiry, which, if duly prosecuted, would have led B. to a knowledge of C.'s rights, shall be treated as equivalent to actual notice to B. of those rights. But where A., dealing with B., makes a particular and distinct representation, material to the interests of B., I cannot admit that A. has a right to say to B., that he, B., should have doubted A.'s word, by reason of any general statement made by A., in which a cautious man might possibly have detected an inconsistency with the particular and distinct representation. The suggestion in the answer of Short & Mahony is, that Bright himself told the plaintiffs that there were no sellers of the iron, other than Short or his firm. There is no evidence of this; and Bright in his answer asserts, that he himself believed there was a bona fide seller of iron other than Short or his firm.

With respect to the circumstance that the deposits, on the 6th June, remained with Short & Mahony, and the form of the guarantee, (upon both which reliance was placed, in argument, as grounds from which to infer an original knowledge in the plaintiffs that there were no sellers, other than Short & Mahony,) I have no hesitation in considering them as insufficient. I cannot consider the particular and distinct representation, *in the documents I have referred to, as countervailed [*378] by inferences from circumstances such as these. Indeed, the case made by the answer as to what took place respecting those deposits on the 6th of June, is not intelligible as it is there stated. If third persons were sellers, the deposits, as they are called, would have been paid over to them. If Short & Mahony were sellers of the iron, the deposits would have come to their hands as so much purchase-money paid on account of the iron

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as such, and would necessarily form items in their account with Bright. But the plaintiffs, as transferees of Bright's interest in the iron, would have had no interest in the deposits, except so far as the value of their interest in the iron would be enhanced by reason of so much of the purchase-money being paid. Now the account which Short & Mahony give of what took place at the meeting of the 6th June, 1845, is this: they say that the plaintiffs were apprehensive, that by the effect of the two letters of the 18th March, which passed between the plaintiffs and Short & Mahony, the plaintiffs had made themselves liable to pay the balance of the purchase-money, ultra the deposits; and that at the meeting of the 6th of June, Short & Mahony, at the request of the plaintiffs and of Bright, ultimately consented, that, in consideration of the deposits of 500*l*. and 2000*l*. being brought into the account between the defendants and Bright, the plaintiffs should be permitted to withdraw, and be exonerated from the further performance and the completion of the two contracts in question; and that the two last-mentioned letters of the 18th of March, 1845, should be given up to be cancelled. How a notion so preposterous as that which the defendants ascribe to the plaintiffs could have existed, I cannot understand: but I am quite as much perplexed with what the answer says about the deposits, if it was really supposed that the defendants Short & Mahony

[*379] had *received them in part payment of iron of which they were sellers. That, however, is their case.

It was then said, that at all events Bright knew that the case was such as the defendants Short & Mahony represent it to have been, namely, that there was no sellers of iron other than Short & Mahony. Admitting, for the purposes of the argument, that such was the case, as between Short & Mahony and Bright, the case of the plaintiffs (that which depends upon the documents I have mentioned) would not be affected by it. Short & Mahony must, according to my view of the evidence, be taken to have represented to the plaintiffs that the interest of Bright in the iron was such as upon the face of the documents it appeared to be; and if that be so, the case, as between Short & Mahony and the plaintiffs, would fall within the principle laid down by Lord

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Eldon in *Evans v. Bicknell*, (a)—that if a representation be made to a man going to deal on the faith of it in a matter of interest, the person making the representation, if untrue, shall make it good. In noticing that case, I may also mention an observation of Lord Eldon bearing upon another point in this case, viz. that the jurisdiction assumed by courts of law in such cases will not oust the jurisdiction of this Court. But I cannot, upon the evidence in this cause, assume, in favor of Short & Mahony, that Bright knew that which they say he knew. Upon the evidence before me I should conclude he did not. It is impossible to read the answer on that part of the case without being struck by its want of precision. The defendants do indeed say, that, with reference to the contract of 14th of February, 1845, Bright consented to that contract being fulfilled by Short or Short & Mahony. Whether the consent of which *they speak [*380] is an inference they draw, or a consent simply given, I do not know, but I conclude it to be the former; for, independently of the expression "consent" being ill adapted to a case in which the arrangement was a concession made for Bright's accommodation, the expressions in the answer are argumentative rather than positive. Thus, in one passage, Short & Mahony say that Bright "must have known" that Short was to be the actual principal in respect to the 1000 tons in the contract of the 14th of February, 1845; and, again, that Bright never made any inquiry as to whether any other person than Short was the seller, or requested to be furnished with the name of the seller, or requested to see the books of the defendants relating to the transaction or containing the usual entry of the sale, or made any suggestion that there ought to be a third party as seller, or that he considered or believed that there was; but, on the contrary, that Bright always acted as if he well knew ("as in fact he did") that Short & Mahony had, on behalf of Short as the principal, taken upon themselves the fulfilment of the contract, and was willing to look to Short in the transaction. This is singular language, if it was matter of express arrangement that Short, or

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Short & Mahony, were the sellers. The answer of the defendants Short & Mahony, with respect to the contract of the 11th of March, is less precise than that respecting the contract of the 14th of February. I doubt much whether it is possible to extract from it an averment that Bright had the knowledge imputed to him. They say they believe, that when the contract or bought note of the 11th of March, 1845, was delivered by Short & Mahony to Bright, Bright fully considered and "believed" that these defendants were, or that the defendant Short was himself the actual seller of the whole of the 2000 tons of iron, and that he was content that he should be so; and upon this follows an argumentative averment similar to that respecting the contract of the 14th of February. Yet this is a most important point in the defendants' case, and is put forward to displace the plaintiffs' equity as claimants under Bright.

This cause must, therefore, in my opinion be disposed of upon the hypothesis that the plaintiffs advanced their money without notice that the transaction was other than on the face of the bought notes and other documents it was represented to be; and also upon the hypothesis that Bright was in the same position. This latter proposition is not necessary upon the point under consideration; but it may perhaps, be of more importance upon another point that remains.

A third point, which, if made good by the defendants, would also displace the plaintiffs' claim under the documents I have above relied upon, was this: that the effect of the transaction of the sixth of June was, that the plaintiffs abandoned all interest whatever in the iron. If Mr. Barrett's evidence is to be believed, this certainly was not the case; and Mr. Barrett's evidence is corroborated by the probabilities of the case. It is to be remembered, that, on the 6th of June, the parties all acted upon the supposition that the contracts were to be completed. Omitting, therefore, the supposed liability of the defendants, they had a very direct interest in waiving their lien upon the iron in favor of any one who would pay the prompts, but no interest in giving up their security against Bright; accordingly, the transaction

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took that turn. The letters between the plaintiffs and Short & Mahony were cancelled; but the security given by Bright to the plaintiffs was retained. The supposed liability of the plaintiffs must have been supposed to arise out of the letters between the plaintiffs *and Short & Mahony only, or the other [*382] documents would have been cancelled also. Mr. Barrett's evidence, which speaks of the strange impression the plaintiffs were under respecting their liability, and which I should have thought he might have removed, is express that their rights, as against Bright, were not abandoned; and I think that is the inference furnished by the facts of the case which are otherwise proved, and which (if compelled to act upon such facts only) I should draw from them. I have no hesitation in receiving Barrett's evidence in support of it. Bright—if that were material—does not pretend that such was not the case. He admits, that, between himself and the plaintiffs, their security was unaffected by the transaction of the 6th of June; and if that be so, the rights of the plaintiffs, as between themselves and Short & Mahony, would be unaffected also, except so far as the plaintiffs might have thereby given to Short & Mahony a priority over themselves, in respect of the deposits on the iron. But this question will not arise; for, if the plaintiffs could have sustained their suit, independently of the cancellation (on the 6th of June, 1845) of the two letters of the 18th of March preceding, I am clear that a transaction which took place between them and Short & Mahony, upon the hypothesis that the contracts were to be completed, (the plaintiffs being ignorant of, but Short & Mahony knowing the truth of, the case)—I say I am clear that a transaction which took place under such circumstances cannot give Short & Mahony any advantage in this court.

The next point I shall notice is that in support of which the case of *Hammond v. Messenger*(*b*) was cited; to which case, and the authorities cited therein may be *added [*383] a reference to the cases of *Rose v. Clarke*,(*b*) and *Barker v. Birch*,(*c*) The authority of *Hammond v. Messenger*, independently

(*a*) 9 Sim. 327.(*b*) 1 Y. & C. C. C. 534.(*c*) 1 De G. & S. 376.

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of the authority of the judge who decided it, is enhanced by the circumstance that the decision was not appealed from, when it is seen who the counsel were in support of the bill. But *Hammond v. Messenger* does not, in my opinion, govern this case. In that case, the question between the obligor in the bond and the party entitled to receive the money due upon the bond (whether obligee or his assignee) was purely legal. In this case, admitting (against my first impression during the argument) that the question between the plaintiffs and defendants might be tried at law, there is an original jurisdiction in this Court, arising out of the fact that Short or Short & Mahony, (as brokers) filled a fiduciary character, the duties of which were not consistent with, but opposed to, their interests as sellers; and, further, that the plaintiffs advanced their money upon a representation which was untrue. The original jurisdiction, to try a right depending upon such considerations, is not ousted, because the right might be tried at law.

But it was said, that although the plaintiffs might have filed a bill to enforce the contract, they could not file a bill to rescind it; and this objection divided itself into two heads: first, that the suit was open to the objection that the relief sought savored, and was within the mischief, of the law against champerty, and *Prosser v. Edmonds*(c) was cited; secondly, that Bright, as between himself and Short & Mahony, might enforce the contract; and that, unless Bright were plaintiff alone or with the plaintiffs, there was nothing to prevent his doing so.

[*384] *With respect to the former of these objections, I am satisfied it proceeds upon a fallacy. If, as in *Prosser v. Edmonds*, the contract which the plaintiffs sought to enforce had been, as between themselves and Bright, a contract for the purchase of a litigated right, the objection might have prevailed; but that was not the case. The contract as between the plaintiffs and Bright, was free from objection. A subsequent discovery, as I will here assume, of a fraud, (as this Court considers it,) has shown that both Bright and the plaintiffs were deceived by the

(a) 1 Y. & C. 481.

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misrepresentations of Short & Mahony ; and the question is, what in that case are the rights of the plaintiffs, as between themselves on the one side, and Short or Short & Mahony, on the other? Is Bright to receive the deposits? That, as between himself and the plaintiffs, cannot of course be maintained ; and if the plaintiffs, as between themselves and Bright, have a right to the deposits, notwithstanding they cannot have the benefit of the purchase of the iron which Bright assigned to them, why may they not enforce that right as against the parties liable to Bright? To their contract with Bright, as I have already said, no objection can be taken : the contrary of which was the ground of the decision in *Prosser v. Edmonds*. The plaintiffs seek by this suit to enforce a right resulting from that lawful contract, of the benefit of which a fraud, newly discovered, has deprived them. The communication between the plaintiffs and Short & Mahony, in March, 1845, is not unimportant on this branch of the case ; and the suit, as I before observed, is sustainable upon the distinct ground of misrepresentation which, whatever its moral character may be, this Court deals with as a fraud.

With respect to the latter objection, I will not say whether it might have prevailed if it had been taken in *an earlier stage of the cause. But if at the hearing of [*385] the cause I am in a condition to make a final decree, which shall prevent the occurrence of that mischief against which the objection is directed, I have always considered that the objection comes too late. It might be sufficient to refer to the common rule of the Court, in the case of a multifarious bill, as an analogy for this practice. The objection, though good in limine, is in general not available at the hearing. Upon this principle I acted in one of the points that arose in *Dyson v. Morris*,^(a) in *Preston v. Wilson*,^(b) and in *Blair v. Bromley*,^(c) and I am satisfied the distinction is well founded.

Lastly, the defendants Short & Mahony have contended, that, if my opinion should be against them upon the main question, they have a right of set-off, which they claim by their answer ;

(a) 1 Hare, 413.

(b) 5 Hare, 185.

(c) *Id.* 542.

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but that is not so. It is on the ground of fraud that the transaction is rescinded; and the payments which were made on the faith of the transaction, cannot form part of any account of the ordinary dealings of the parties.

These are my conclusions; in coming to which I have not relied upon Barrett's evidence upon any point substantially in dispute, (except the point in which it merely corroborates an inference I should have drawn from undisputed facts without it,) and in which I have endeavored to do justice to all the points made at the bar.

Decree for payment of the deposits, with interest and costs.

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*SMITH v. FOX.

1848: 21st and 26th Jan.

Demurrer to a bill of discovery, in aid of action on the case for negligence, allowed; it appearing by the bill that the cause of action had not arisen within six years before the suit.

In an action on the case, against an attorney for negligence, the Court held that the cause of action arose at the time the negligence occurred, and not at the time the negligence was discovered, or the consequential damages ensued.

THE defendants, Fox & Southam, as the solicitors of the plaintiff, took proceedings to get in a sum of money, due to the plaintiff on mortgage; and with this view, on the 29th of June, 1829, they gave notice to the mortgagor that the power of sale contained in the mortgage deed would be exercised. In pursuance of this notice, the mortgaged property was sold. In the year 1837 the representatives of the mortgagor brought their bill for redemption, impeaching the sale, on the ground that due notice had not been given according to the terms of the mortgage deed; and a decree for an account and redemption was made in January, 1841. The report in the cause was made in March, 1844; and the cause was shortly afterwards settled on the footing of the decree and the report. In November, 1846, the plaintiff

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brought an action on the case against the defendants, for negligence in the conduct of the proceedings in 1829; and he filed his bill of discovery in aid of the action, alleging, that, by the culpable neglect of the defendants in giving an insufficient notice, the sale had been invalid, and he had sustained a loss of 2000*l*. and upwards. Southam died after the bill was filed, and Fox demurred.

Mr. *Rolt* and Mr. *Archibald Smith*, in support of the demurrer, contended that the right of the plaintiff to recover, in respect of the negligence complained of, was barred by the Statute of Limitations. The cause of action accrued not in the year 1841, when the decree in the redemption suit was made,—nor in 1844, when the suit was terminated, and the damage actually suffered; but *in the year 1829, when the alleged breach took [*387] place, upon which the action was founded. This was the case in *assumpsit*, *Short v. McCarthy*; (a) and also in case, *Howell v. Young*. (b) The Statute of Limitations being a defence at law, was also a defence to the bill of discovery: *Baillie v. Sibbald*, (c) *Scott v. Broadwood*, (d) *Gait v. Osbaldeston*, (e) *Mendizabel v. Machado*. (f) *Hindman v. Taylor* (g) has not been fol-

(a) 3 B. & A. 626.

(b) 5 B. & C. 259.

(c) 15 Ves. 185.

(d) 2 Coll. C. C. 447.

(e) 1 Russ. 158.

(f) 1 Sim. 68.

(g) 2 Bro. C. C. 7. An attempt has been made in another place (Tr. on Discovery of Evidence, 48) to state the reasoning upon which the case of *Hindman v. Taylor* may be reconciled with the other authorities. The proposition that a plea, which is a legal bar to an action at law, is in no case a defence to a bill of discovery in aid of that action, can scarcely be attributed to Lord Thurlow, before whom, in other cases, the right to sue at law was discussed as the test of the right to discovery in equity. It is sufficient to mention *Rondeau v. Wyatt*, 3 Bro. C. C. 154, where, upon the argument of a plea to a bill of discovery, Lord Thurlow was required to consider, and formed his judgment upon, the authorities at law on the question whether a contract for the purchase of flour, to be delivered at a future time, was within the Statute of Frauds. There is no doubt, that, if it appears by the bill, or can be shown by plea, that the plaintiff has no right or remedy at law, (as in *Smith v. Fox*, above,) equity will not give a discovery, which, as Lord Thurlow said, in *Rondeau v. Wyatt*, "would be merely impertinent." On the other hand, the plea, upon which the defence rests at law, is not necessarily a good plea to the bill of discovery. Suppose the case of a bill of discovery in aid of an action

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[*388] lowed: *Robertson v. Lubbock*, (a) Wigram's Points on the Law of Discovery, p. 43. ed. 2. And the defence

of trover, to which the defendant has pleaded not guilty, (*Martin v. Hampton*, Choyce Ca. in Cha. 123,) it is obvious the same plea could not be allowed in equity; and perhaps it may be difficult to suggest a case where the plea at law is the general issue, or where the plea at law will require to be established, or may be controverted, by evidence, in which the same plea can be used as a bar to the discovery. It is submitted, that the judgment of Lord Thurlow, in *Hindman v. Taylor*, must be considered and explained with reference to the case before him. The circumstances of that case are not very fully reported, nor does it appear whether the action at law had actually been brought. It would rather seem that proceedings at law had not been commenced. If the plaintiff had in that case brought assumpsit on the contract, and the defendant had pleaded the general issue, with the intention of relying upon the erasure of the signature of the parties from the original instrument, as disabling the plaintiff from recovering upon the contract, which, perhaps, he might have done, (*Powell v. Devett*, 15 East, 29; *Master v. Miller*, 4 T. R. 320,) the discovery would, on the ordinary rule of the Court, have been given. If, instead of pleading the general issue, the defendant had pleaded specially the cancellation of the original instrument, (*Davidson v. Cooper*, 11 M. & W. 778,) or had pleaded a subsequent contract in satisfaction of the former, the Court must have given the discovery, or tried the legal question on the facts disclosed upon the bill and plea. The plaintiff, it appears, required, among other things, a discovery from the defendant with regard to the money which had been deposited with the bankers, in pursuance of the original agreement. Lord Thurlow, in overruling the plea, refused, as preliminary to a determination of the question whether the plaintiff was entitled to the discovery in aid of his action, to try what would be the legal effect of the new circumstances upon the original contract. Whether the degree of difficulty, in a legal question, may be so great that the Court would not try it upon the argument of a plea or demurrer to a bill of discovery; or whether, in refusing to try the question, the Court would give the discovery and leave the party to insist, in the action at law, upon the matter which he had sought to use in equity to protect himself from discovery, (as in *Hindman v. Taylor*;) or whether, refusing itself to try the legal question, the Court of Equity would order the plea or demurrer to stand over, and send a case for the opinion of a Court of law, before it determined the question of the right to discovery, has not been decided. There is no instance of the latter course having been taken on the argument of a plea or demurrer to a bill of discovery; and it would be dilatory and circuitous. The doubts which have been expressed as to the authority of the case of *Hindman v. Taylor* certainly arise, if the language of Lord Thurlow, in his judgment on that case, be taken abstractedly, without reference to the circumstances to which he was then applying the rule of pleading there laid down; but taking the judgment in connection with the subject with which the Court was dealing, it may, perhaps, be said,

(a) 4 Sm. 161.

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may be *raised by demurrer, as well as by plea: *Bampton v. Birchall*.(a) [*889]

Mr. Romilly and Mr. Shebbeare, for the bill.—The question is, whether, in the case of an action brought and a bill filed for discovery pertinent to the action, this Court will try the right of action upon demurrer to the bill of discovery. The judgment of Lord Thurlow, in *Hindman v. Taylor*, has not been overruled, and is not inconsistent with principle: *Leigh v. Leigh*.(b) This is the first case in which the Statute of Limitations has been set up as a defence by way of demurrer to a bill of discovery. Assuming, however, that what would be a bar at law to the action, is also a bar in equity to the discovery, and that the defence is one which may be raised by demurrer, the objection to the suit cannot be sustained; for the cause of action did not arise until the damage accrued, in 1841, and consequently, the statute has not intervened. An action could not be brought until the misconduct was known, and the misconduct could not be known until the Court had decided that the proceedings with regard to the sale were invalid. Can it be said that the injured party is to be without remedy, because, from the slow progress of a suit, or from other causes, the misconduct of a solicitor is not known until more than six years after the negligence occurred? In assumpsit the cause of action arises on the breach of promise: *Battley v. Faulkner*,(c) *Short v. McCarthy*(d) [*890] *Tanner v. Smart*.(e) In trespass also, the cause of action arises at the time when the wrongful act is done, and does not wait until a special damage accrues, although such special damage may afford the measure of the damages to be given: *Fitter v. Beal*.(f) The distinction between such a case and an action on the case, founded on a consequential damage, is expressed by

in the words of Sir J. Leach, (1 Sim. 78,) that that case, when it is carefully considered, will be found consistent with the doctrine, that a plea, that the plaintiff has no interest in the subject of the suit, is a good plea to a bill of discovery.

(a) 5 Beav. 77.

(b) 1 Sim. 349.

(c) 8 B. & A. 238.

(d) *Ubi supra*.

(e) 6 B. & C. 603.

(f) Salk. 11.

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Sir William Blackstone in *Scott v. Shepherd*:(a)—“If I throw a log of timber into the highway (which is an unlawful act) and another man tumbles over it and is hurt, an action on the case only lies, it being a consequential damage; but if, in throwing it, I hit another man, he may bring trespass, because it is an immediate wrong.” This is plainly a case of consequential damage, which did not arise until the decree of 1841 was pronounced, and the cause of action was thereby made complete. The effect of the statute in many cases depends on the form of the action: *Inghis v. Haigh*.(b) The case of *Howell v. Young* was not in conformity with earlier authorities: Saunders’ Reports, by Williams, p. 68 e, n. (m.) But the plaintiff in a bill of discovery is not required to show that the action at law, which he proposes to bring, must be sustainable upon authorities which cannot be controverted. If the cases at law be merely doubtful, or if it be, as Lord Thurlow has said, “a measuring cast,”(c) this Court will not refuse to give the discovery. The effect of allowing the demurrer will be, to preclude the plaintiff from obtaining the decision of the Court of Law upon the legal question; and rather than such a consequence should follow from withholding its assistance, the Court would order the demurrer to stand [*391] over, and direct a *case for the opinion of a Court of law, as in *Spry v. Bromfield*.(d)

Jan. 26.—VICE-CHANCELLOR:—Two questions were argued upon the hearing of the demurrer in this case,—one, whether, according to the dates of the transactions alleged to have taken place by the bill, the Statute of Limitations is a bar to the action; and the other, whether, if the first question be answered in the affirmative, there is still a case upon which the plaintiff is entitled to discovery.

Whatever question might, at one time, have existed upon the point, it is now clear, that the defence that the Statute of Limita-

(a) 2 W. Black. 892.

(b) 8 M. & W. 769.

(c) *Rondeau v. Wyatt*, 3 B. C. C. 154. See also *Thomas v. Tyler*, 3 Y. & C. 255.

(d) 12 Sim. 75.

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tions is a bar to the suit, may be raised by demurrer. There is no doubt but that is so, where relief is sought in equity; and I apprehend that it is the same where discovery only is sought in aid of relief at law. It is immaterial, with a view to this question, whether the relief be in equity or at law; the point to be determined upon the demurrer, in both cases, is simply, whether the plaintiff is entitled to an answer or not. So, also, whatever question there might at one time have been, upon the reasoning of Lord Thurlow in *Hindman v. Taylor*, as to the point raised to the defence in equity being the very point to be tried by the action, it is now settled, that a party, applying to this Court for discovery in aid of an action, in which the defendant may, by plea or demurrer, show that the plaintiff is not entitled to recover, may raise the defence by plea or demurrer in equity. The justice of the case requires that the defence to the discovery should be *open to the defendant in equity; and [*392] my recollection of the unreported observations of the present Lord Chancellor in *Hardman v. Ellames* upon the case of *Hindman v. Taylor*, satisfies me that such is the rule, in his opinion, as well as in that of other Judges; though they have not expressly overruled the case of *Hindman v. Taylor*.

The question, then, is, whether the defendant is barred by the Statute of Limitations, or when, in fact, the cause of action arose as alleged by the bill. If it arose when the act of negligence occurred, the statute is a bar; but if it did not arise until the plaintiff sustained the injury, the case is not within the statute. According to the case of *Howell v. Young*,^(a) the cause of action arose not later than June, 1829, when the insufficient notice was given. Since the argument of the demurrer, I have endeavored to ascertain whether that case is considered to be law in Westminster Hall. I find it is so considered; and the demurrer must therefore be allowed.

(a) 5 B. & C. 259.

1848.—*Alexander v. Young.*

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*ALEXANDER v. YOUNG.

1848: January 26 and 31.

Although a bequest of stock for a married woman, for her separate use for her life, and, after her decease, for her appointees by deed or will, directs that any appointment by deed shall not come into operation until after her death, the married woman is not thereby restrained from anticipation, or prevented from appointing the fund by an irrevocable deed.

THE bill was brought by the mortgagee of a sum of 1000*l.* stock, and by the tenant for life, a married woman, who had also a power of appointment of the fund,—praying a transfer of the stock to the mortgagee. The fund was bequeathed to the plaintiff, the tenant for life, for her life, for her separate use, and, from and after her decease, upon trust for such person or persons, for such intents and purposes, as she should by deed or will appoint; but in case any appointment should be made by deed, the same not to come into operation until after her death. The plaintiff, the tenant for life, had assigned and appointed the fund, by deed, to the other plaintiff, the mortgagee.

Mr. *Romilly* and Mr. *Wetherell*, for the plaintiffs, said, the only difference between this case and *Lynn v. Ashton*(a) was, that, in the present case, the testator had directed that an appointment by deed should not come into operation until after the death of the lady. Those words could not prevent the union of the life interest and the interest in remainder, so as to give her an absolute interest. The gift in remainder to the appointees of the plaintiff, the tenant for life, could not, in any event, take effect until her death, as there was a previous gift to her for life; the words of the will, to that effect, were therefore superfluous. The plaintiff had by the appointment denoted the persons who were to take the fund, and the Court would give effect to that appointment, disregarding the time or manner of its operation.

(a) 1 R. & M. 186.

1847.—*Green v. Briggs.****Mr. Hardy, for the husband of the female plaintiff. [*394]**

Mr. *Piggott*, for the personal representative of the last survivor of the trustees of the fund, suggested that the words, qualifying the power of appointment by deed, might be considered as equivalent to a clause against anticipation.

Jan. 31.—VICE-CHANCELLOR:—The only question is, what effect is to be given to the clause of the will, which directs, that any appointment the donee may make by deed, shall not, “come into operation until after her death.” Is it possible to construe those words as giving her power to appoint the fund only by a revocable deed? I think the power is not so restricted, and that the appointment may be irrevocable. It is equally impossible to read the clause as amounting to a restraint against anticipation. The plaintiffs are entitled to a transfer of the fund, according to the prayer.

*GREEN v. BRIGGS.

[*395]

1847: 6th, 8th, 9th, 13th November. 1848: April 12.

Part owners are tenants in common of a ship, but jointly interested in her use and employment; and the law as to the earnings of a ship, whether as freight, cargo, or otherwise, follows the general law of partnership.

A part owner of a ship has a right to require the gross freight to be applied, in the first place, in payment of the expense of the outfit of the ship for the voyage in which the freight was earned, notwithstanding he might sue his co-owners for their proportion of the expenses before the adventure ends.

The same rule applies to the expenses of repairs to the hull of the ship, where such repairs were done with a view to the particular adventure in which the earnings were made, and without which that adventure could not have been undertaken; and it would seem that the circumstance that such repairs are not exhausted in the adventure, does not create any exception to the rule.

The term “lien” does not properly describe the right of a part owner to be reimbursed, out of the gross freight, the amount of expenses incurred in the prior repair and outfit of the ship.

1847.—Wilson v. Short.

THE object of this suit was to determine which of the parties was entitled to a sum of 6939*l.* 12*s.* 8*d.*, the earnings of the ship "Thames," made during the years 1841, 1842, and 1843, in a voyage from England to Calcutta and the China seas. The claimants were, 1,—the plaintiff, who was the registered owner of 8-64ths of the ship, and was also the managing owner or ship's husband, in which capacity he had expended and become liable to pay a sum of money, exceeding the 6939*l.* 12*s.* 8*d.*, for the repair and outfit of the ship, preparatory to the voyage; and 2,—Briggs, Thorburn, & Co., who were mortgagees of 56-64ths of the ship and freight, to secure a sum of money (exceeding the amount in question) owing to them from the mortgagors, Acraman & Co., the registered owners of such 56-64ths. The mortgage was made during the voyage, and, therefore, after the expenditure in the outfit and repairs had been incurred. Acraman & Co. had become bankrupts, and their assignees were parties to the suit. The plaintiff's proportion of the ship's earnings, in respect of his 8-64ths share, had been paid to him, and the residue, representing the proportion attributable to the other 56-64ths, (amounting to the said sum of 6939*l.* 12*s.* 8*d.*) awaited the result of the suit. The bill prayed that this sum might be applied towards the payment of the expenses to which the plaintiff had made himself liable for the outfit and repairs of the ship before she sailed, in July, 1841.

[*396] *Mr. *Romilly* and Mr. *Roundell Palmer*, for the plaintiff.

Mr. *Wood*, and Mr. *Cairns*, for the defendants Briggs, Thorburn, & Co.

Mr. *Walker* and Mr. *Osborne*, for the assignees of Acraman & Co.

The cases referred to in the judgment, and the following cases, were cited. On the argument whether freight was necessarily incident to, and would pass with, the transfer of the ship, or whether the right to freight remained in the owner, by whom

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the transfer was made—*Morrison v. Parsons*,^(a) *Dean v. Mc Ghie*,^(b) *Case v. Davidson*,^(c) *Langton v. Horton*,^(d) *Stephenson v. Dawson*,^(e) *Splidt v. Bowles*,^(f) *Davenport v. Whitmore*,^(g) *Douglas v. Russell*,^(h) *Kerswill v. Bishop*,⁽ⁱ⁾ On the question how far owners of ships were, in that character, subject to the general law of partnership, and to the consequent liabilities—*Wilson v. Dickson*,^(k) *Ex parte Bowes*,^(l) *Dale v. Hamilton*,^(m) *Elliot v. Browne*,⁽ⁿ⁾ and *Ex parte Bland*.^(o)

1848: April 12.—VICE-CHANCELLOR:—The plaintiff was the registered owner of 8-64ths or 1-8th, and Messrs. Acraman of & Co., Bristol, of the *other 56-64ths, or 7-8ths of the [*397] ship "Thames;" and the plaintiff was also the managing owner, or ship's husband. In 1840, preparatory to a voyage then contemplated, the plaintiff, as managing owner, caused the ship to be extensively repaired, refitted, and fitted out for her voyage. In July, 1841, the ship sailed from the port of London for Calcutta, with instructions to the master, after discharging his cargo at Calcutta, to accept such employment of the ship in the China seas, as, upon communication with the agents of the owners at Calcutta, he should deem advisable. The repairs, refitting, and outfit of the ship appeared to have been made, in the first instance, in the hope or expectation that the ship would have been taken up and employed by the East India Company for the transport of troops from this country. That, however, was not done; but, after her arrival at Calcutta, she was employed in the China seas, and continued to be so employed, down to March, 1843, and earned freight to a large amount. In the spring of 1843 the "Thames" sailed from Calcutta for England, and arrived in the port of London in September, 1843. On this homeward voyage she earned some further freight, but which did not exceed her expenses; and, shortly after her arrival at

(a) 2 Taunt. 407.

(d) 5 Beav. 9; 8 C., 1 Hare, 549.

(g) 2 M. & C. 177.

(k) 2 B. & A. 2.

(n) 3 Swanst. 489, n.

(b) 4 Bing. 45.

(e) 3 Beav. 342.

(h) 4 Sim. 524.

(i) 4 Ves. 168.

(o) 2 Rose, 91.

(c) 5 M. & Sel. 79.

(f) 10 East, 279.

(j) 2 C. & J. 529.

(m) 5 Hare, 369.

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home, she was sold and broken up. By a bill of sale, dated the 30th of November, 1841, after the departure of the ship on her voyage, the Acramans transferred to the first-named defendants in the cause, who were trading under the firm of Briggs, Thorburn, & Co., of London, their 56-64ths of the ship, by way of mortgage for securing to them 15,000*l.* and interest, and, on the 2nd of December, 1841, the mortgage was registered. By an indenture of assignment of the 30th of November, 1841, (the same date as the bill of sale,) and made between the Messrs, Acraman, of the one part, and the defendants Briggs, Thorburn, & Co., of the other part, the Acramans assigned to [*398] Briggs, *Thorburn, & Co. all their shares in the ship, and all sums and sum of money then due, owing, or payable, or to become due, owing, and payable, for freight and earnings, for any voyage of the ship from Calcutta to any place abroad, or for her voyage from Calcutta or any place abroad to this country, and in all charter-parties and contracts for freight, to secure the 15,000*l.* and interest mentioned in the said bill of sale. On the 18th of December, 1841, Briggs, Thorburn, & Co. gave the plaintiff notice of these assignments. On the 30th of March, 1842, the plaintiff received a further notice from the same parties of another indenture, dated the 23rd of March, 1842, and expressed to be made in pursuance of the covenant for further assurance in the assignment of the 30th of November, 1841. The effect of the indenture of the 30th of March, 1842, was (so far as the object of this suit is concerned) merely to adapt the language of the security to the state in which the earnings of the ship might, at the time of the new security, be supposed to be.

On the 30th of November, 1842, the Acramans stopped payment, and, on the 11th of June, 1842, a fiat in bankruptcy was issued against them, and the three last defendants on the record were appointed their assignees. Fergusson, Brothers, & Co., of Calcutta, were the agents there of the Acramans, down to the time of their stoppage, of Briggs & Co., and also of the ship "Thames." The firm of Fergusson, Brothers & Co. received the ship's earnings; first, on the voyage to Calcutta; and, secondly,

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in respect of her employment there, down to April, 1842, and made disbursements, on account of the ship, down to the 24th of June, 1842.

Upon the stoppage of the *Acramans*, the plaintiff, and Briggs, Thorburn, & Co., appointed Mackillop, Stuart, & Co.

*their agents in Calcutta, in respect of the ship, without [*399] prejudice to any question as to the application of her earnings. This was done under a power of attorney, dated the 29th of April, 1842, directing Mackillop to receive the ship's earnings, and remit them to Palmer, Mackillop, & Co. of London, to the joint account of the plaintiff, and Briggs, Thorburn, & Co., of London. It appeared, that an agreement of the same date was made between the same parties, by which it was agreed, that what was then done with the freight should be without prejudice to its application afterwards. After this, Fergusson & Co. closed their account, in respect of the ship, and remitted to Briggs, Thorburn, & Co. 693*l.* 3*s.* 4*d.*, the balance of the ship's earnings in their hands. Mackillop & Co., of Calcutta, received the further earnings, and remitted the same to Palmer & Co., of London, who deducted expenses and payments made to the plaintiff; after which there remained in their hands 6246*l.* 9*s.* 4*d.*, representing the net earnings, received after the 30th of April, 1842, down to the commencement of the ship's homeward voyage. By the consent of the plaintiff and Briggs, Thorburn, & Co., this sum was paid into, and has since remained in the Bank of England, in the joint names of the plaintiff and the defendant Robert Thorburn, to abide the result of the suit. The plaintiff has received out of the ship's earnings money equal in amount to his 8-64ths or 1-8th share. The 693*l.* 3*s.* 4*d.*, in the hands of Briggs, Thorburn, & Co., and 6246*l.* 9*s.* 4*d.*, in the Bank of England, making together 6939*l.* 12*s.* 8*d.*, represent the 56-64ths or 7-8ths of the ship's earnings during the whole period, from the time she left England, in July, 1841, until her return, in March, 1843: that is, treating the expense of the homeward voyage as precisely a set-off against the expenses. If all the expenses of repairs, refitting, and fitting out before she sailed, in July, 1841, had been paid by the owners in

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[*400] proportion *to their respective shares, it is admitted that Briggs, Thorburn, & Co. would be entitled to those sums; but this is not the state of the case. At the time of the bankruptcy of Messrs, Acraman, they had not paid any part of their proportion of the expenses of the repairs, refitting, and outfit of the ship, and the plaintiff, as the only solvent owner, became liable to the whole demands of the creditors. These demands exceeded 16,000*l*. The plaintiff has paid more than his 1-8th part of these debts, and is liable to pay the balance, which balance exceeds the 6939*l*. 12*s*. 8*d*. with Briggs, Thorburn, & Co., and in the Bank of England. The plaintiff also claims other sums for his disbursements, as ship's husband, on account of himself and his co-owners since the ship sailed. Briggs, Thorburn, & Co. demanded the freight before the ship returned, but did not take possession of the ship as mortgagees, and always denied their liability to any part of the expenses.

The question in the cause which I have to decide is, whether the money in the Bank is liable to defray what I will call the ship's debts, contracted before she sailed, in July, 1841; or whether Briggs, Thorburn, & Co. are entitled to receive that money, leaving the plaintiff personally liable for such debts. The plaintiff claims to be entitled to what he asks, first, by the general law of partnership; and, secondly, by the custom of trade in like cases.

Before I enter upon this question, I shall advert to an expression, which I find in the pleadings and in the evidence, (especially in that of the defendants' three witnesses,) and which was much used in argument, by which, I think, the just consideration of the case is by *no means assisted. I mean

[*401] the word "lien." It is of course immaterial by what form of expression the plaintiff's claim is described, provided the sense of that expression is clearly defined or understood. But when a word, such as "lien," (having a technical meaning,) is used in a case like the present, there is danger of importing into the consideration of the case, arguments which, though strictly applicable to the law of "lien," in its proper sense, may not properly belong to the subject in hand. I cannot but think

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that, upon cross-examination of the defendants' witnesses, much of the apparent force of their evidence might have been found to depend upon the meaning they have attached to the word "lien." However, that the precise grounds of my judgment may appear, I shall drop the word "lien," and consider the question to be, what in principle it is, and what the prayer of the bill makes it, a question whether the owners of 7-8ths are entitled to the gross freight now in hand, or only to the net freight, after defraying the expenses of earning it. To try this, I shall begin by excluding from the case Briggs' mortgage, and consider it as if Acraman or his assignees (for they clearly stand in his place) were the parties contesting with the plaintiff.

The case of *Doddington v. Hallett*,^(a) was referred to in argument by the plaintiff's counsel, but only (as I understand) for the purpose of excluding the suggestion that the plaintiff relied upon it, or upon the doctrine it contains, for supporting his claim in this suit. I collect from Story on Partnership,^(b) that upon principles of public policy and convenience, America has adopted *Doddington v. Hallett*. But, however that may be, it is certain that Lord Eldon, in *Ex parte Harrison*,^(c) and in *Ex parte Young*,^(d) deliberately overruled it. And the [*402] plaintiff was not wrong in reminding me at the outset, that what he seeks by this suit is, not to affect the ship or the proceeds of the sale of the ship, but only to have her gross earnings, or a sufficient part, applied in paying the expenses incurred in making them, before profits are divided amongst the part owners.

From this point I shall start by making three assumptions: first, by excluding the repairs of the hull of the ship; secondly, by supposing the ship's earnings to have consisted of a cargo of whale oil made upon a whaling voyage, and not to have arisen in the shape of freight; and, thirdly, by assuming that the voyage was simple and entire, and not affected by considerations

(a) 1 Ves. 497.

(b) Sect. 444.

(c) 2 Rose, 76.

(d) 2 Rose, 78, n.; 2 Ves. & B. 242; and see also *Buxton v. Snee*, 1 Ves. 154, and *Brent v. Hay*, Bell's Sup. to Ves. sen. 85.

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which sometimes apply where an entire voyage out and home has, for some purposes, been considered as consisting of several voyages. After these assumptions I need not dwell long upon the point first contended for by the plaintiff. *Holderness v. Shackels*,^(a) is a case in point. The Court distinguished between the ship itself, and her earnings; and held in that case, that although part-owners were tenants in common of the ship, they were jointly interested in the use and employment of the ship, and that the law as to earnings must follow the law in partnership cases. And in *Ex parte Hill* the Vice-Chancellor said, "If there had been no sale the creditors would have had no lien on the ship, because that was not joint property; but the earnings of the ship would have been joint property, and liable to the joint creditors, not from any doctrine peculiar to the earnings of a ship, but on the general principle applicable to the [*403] *joint property of every partnership^(b)." If in this case the "Thames" had been employed on a whaling voyage, and the money now at the Bank represented the cargo, no dispute could have arisen.

Then is freight, *qua* earnings distinguishable from other earnings of a ship for the purpose under consideration? In the absence of authority establishing such a distinction, or a clear principle requiring me to adopt it, I will not admit it. The authorities in fact, as far as they go, negative the distinction instead of supporting it. In *Ex parte Young*,^(c) in which Lord Eldon's mind was distinctly called to the difference between the ship and her earnings, he said, "I have no doubt that freight is liable to the joint demand: as to the ship, it stands upon the nice distinction of a tenancy in common." In *Ex parte Hill*,^(d) the earnings of the ship, with which the Court had to deal, was freight. In *Ex parte Christie*,^(e) Lord Eldon said, that what was coming from the master was joint earnings. The language of Story on partnership^(f) is not opposed to this conclusion. The learned author meant only to state what he considered clearly decided by au-

(a) 8 B. & C. 612.

(b) 1 Madd. 66.

(c) 2 Rose, 78, n.

(d) 1 Madd. 61.

(e) 10 Ves. 105.

(f) Sect. 441.

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thority, and not to say that freight might not be subject to the same law as other earnings of a ship. Does principle then require me to admit the distinction contended for, between freight and cargo, for a purpose like the present? Suppose a ship by the consent of the owners to be fitted for a voyage and to make profit partly by freight, and partly by merchandise. *Holderness v. Shackels* furnishes the law^a in the one case. Upon what principle is the mode of adjusting the account between the part-owners to be split, with reference only to the nature of the earnings *the ship has made? Am I bound to hold that [*404] each alteration in the employment of a ship, which accident or convenience may, from day to day suggest, is to affect the rights of the part owners *inter se*, as to the expenses necessary to prepare the ship for her employment? So here, in fact, (though it forms no part of the argument on which I mean to rely,) it does appear that the profits made were not exclusively from freight; that there was a cargo of beer, or some article of export to a small amount, that entered into the transaction. If a distinction like that contended for,—a distinction which leads to manifest injustice, and in support of which nothing but what Lord Eldon in *Young's case* calls a “nice distinction,” turning upon a tenancy in common, be not already established, I see no ground for it. The case of *Helme v. Smith*(a) was referred to. In that case it was decided, that the managing owner may sue each shareholder for his proportion of the expenses before the adventure ends, which it was said in an ordinary partnership he could not do. Other cases to the same effect were cited. But there is no reason why that right should preclude the partner, who made an advance for his copartner for joint purposes, from insisting, where joint property comes to be divided, that in making the division, each partner, before he receives his proportion of profits, shall be charged with his due proportion of the expenses of making them. The observations of Mr. Justice Bosanquet, in *Helme v. Smith*, apply to that view of the case.

(a) 7 Bing. 709.

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Moreover, the objection would apply as strongly to *Holderness v. Shackels* as to any case.

A form of expression found in numerous cases was next relied upon; namely, that "freight follows the ownership in a ship, as an incident;" and *Case v. Davidson*(a) *and other cases to the same effect were referred to. This law I do not doubt, but it is plain that those cases have no bearing upon the principal case. The question in those cases has been, who was the rightful party to receive such freight as was payable; and not whether the freight to be paid was gross or net freight, which is the only question here. Here there is no dispute that Briggs & Co. are entitled to such freight as is coming in respect of Acraman's share, and the only question is, whether the expenses of earning the freight are not, as between the part-owners, to be first paid in ascertaining what freight is coming. Excluding then the expense of the repairs of the ship, I hold that the plaintiff has a right to have the gross freight applied in paying the expenses of the refitting and outfit of the ship before any division amongst the part-owners shall be made.

The argument against the plaintiff's claim to have the expenses of repairs protected in the same way, was in substance this: that the repairs to the hull of the ship were inseparable from it; that they were, in effect, improvements of the chattel held in common, and must be governed by the same law which regulates the rights of the shareholders *inter se* respecting the ship itself. Now I will not deny, that a case may exist in which the question of repairs would necessarily be so dealt with. Nor will I say that any rule of logic would be violated by applying that reasoning to all cases of repairs. Nor, if I found authority supporting that reasoning in its application to repairs, do I say that my individual opinion is so strong against it, that I should feel justified in opposing that opinion to any distinct authority. But that is not the question here. I am satisfied there is nothing, in point of authority, to prevent my holding that repairs necessarily and properly done, with a view to a particular adventure,—repairs without which

(a) 5 M. & Sel. 79; S. C. in error, 8 Price, 542.

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the *particular adventure could not be undertaken, [*406] should be governed by the same considerations which apply to such parts of the refitting and outfit as are inseparable from, and not part of the ship. And, if that be so, I cannot hesitate in preferring a conclusion which (without possible injury to any one) excludes the technical distinction upon which Lord Eldon overruled *Doddington v. Hallett*, and applies to this case the equitable rules by which the rights of partners *inter se* are regulated. I say without possible injury to any one, because, if, at the expiration of the adventure, the ship be of increased value, each tenant in common will, in that character, have the benefit of the improvement. The question, however, is whether, upon legal principles, this is the right conclusion.

For the purpose of trying this I will first suppose, that the repairs are strictly necessary for the purposes of the adventure, and such as would be exhausted in the adventure. Why are the expenses of such repairs not to be treated as part of the capital employed by the adventurers on joint account? All expenditure for the purpose of, and necessary to the joint adventure, must, *prima facie*, be taken to be the capital embarked in the adventure. The circumstance that the ship (held in common) is, during the adventure, improved in value, cannot by any logical rule alter the character of the expenditure which was made with a view to the adventure; and if that be admitted, the case is ended, for a partner who has not paid up his share of the capital, cannot entitle himself to a share of the profits, without giving credit for the share of capital which he ought to have supplied. It would not be difficult to suggest a case in which tenants in common of land, agreeing to be partners in farming it for experimental, as distinguished from ordinary agricultural purposes, and incurring extraordinary expenses *in so doing, [*407] by which the land itself is improved during the partnership, would, as between each other, have a right similar to that which I hold to exist in this case.

Would, then, the circumstance, (if it existed,) that the expenditure in repairs was not exhausted with the adventure, alter the case? If expenditure were necessary or proper for a specific

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purpose, why should this incidental consequence alter the case? I have already said, that no injury could possibly result to any party from it. The utmost consequence, however, would be the apportionment of the expenses of the repairs. In this case, the evidence is, that the repairs were necessary for the adventure. The ship, at the end of the voyage, was in fact broken up, and the defendant has made no case for apportionment. Where the reasoning upon which Lord Eldon overruled *Doddington v. Hallett* applies, it must be acted upon; where it does not, the principle upon which *Doddington v. Hallett* proceeded will, I conceive, be followed.

The only assumption (except the mortgage) which I have to consider is, whether the voyage is to be properly considered single or not. No question arises here between persons claiming in respect of the ship's expenses incurred at successive times. The question (excluding the mortgage) is between those who have been owners throughout. Upon the evidence in the cause, I should certainly conclude in favor of the singleness of the voyage, for the purposes now under consideration. But it is unnecessary to go much into that view of the case. No profit having been made in the homeward voyage, the case may be considered as if the ship had been sold the day before she sailed on her homeward voyage. The case then is reduced to this; the ship sailed from this country, for the purpose of being employed [408] *in the China seas. The master was so instructed. But as the parties here could not say beforehand what specific employment would be most eligible, it was of necessity left to agents in India to settle that. Here the profits were made. How can it be said that this, as between the co-owners, makes the adventure several?

I have hitherto omitted the circumstance, that the plaintiff was the managing owner. I have purposely done so, because the principle I have gone upon,—that of *Ex parte Young, Holderness v. Shackels*, and *Ex parte Hill*,—supersedes it. But it is obvious that when the duties of a managing owner (a) are considered, they

(a) See Abbott on Shipping, 165 et seq., 8th ed.

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strengthen the case, if they do not give a new ground. Mr. *Walker* says, that in all cases in which the ship's husband succeeded, he had the freight in hand. That may be necessary where the ship's husband is a stranger; but not where the law of partnership applies. I have certainly desired to avoid going into this part of the question, or making it the foundation of my judgment. It will be remembered how frequently Lord Eldon referred to his local knowledge in coal-mine cases. It happened to me, early in life, to spend a great deal of my time with persons who had to deal with these shipping subjects, and I am confident that no managing owner of a ship at that day would have thought it open to argument, that the freight was not to pass through his hands and bear the expenses of earning the freight of the ship. I put the case on the ground to which I think it properly belongs. This is an adventure undertaken by the part-owners of a ship, which is a tenancy in common, employed for the purposes of a joint adventure; and whatever expenses are properly incurred, it appears to me, those expenses must come out of the earnings of the *ship, before the earn- [*409] ings are to be divided. Upon the question of usage I will only say, that I certainly should not have decided this case against the plaintiff upon that point, without giving him the benefit of the evidence in support of the usage, at least, so far as to have given him an issue to try that question.

I exclude altogether the consideration of what the mortgagees might have done, by taking possession and acting as owners. A totally different state of things might have then existed. This, however, they did not and would not do. To avoid personal liabilities, they left the ship in the hands of the mortgagors and co-owners to be managed by them; and in that way earnings were made. The mortgagees, being mortgagees of the freight by a different instrument, although of the same date with that which assigned the ship, claimed the freight, but did nothing more. I agree with Mr. *Wood*, that if it were necessary to fix the mortgagees with notice of the plaintiff's interest, there is sufficient to do it. But the principle to which I confine myself supersedes that. The thing mortgaged to Briggs, Thorburn, & Co. was Acraman's in-

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terest in the ship, subject to an existing adventure, which the mortgagees did not think proper to disturb, if they could have done so. In such a case, I think they stand in the position of *Acraman*, and in no better position.

The decree declared, that the gross earnings of the ship were liable to the expenses of her repairs, refitting, and outfitting, and of the voyage; and referred it to the Master to take the accounts, reserving further direction.

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**COSTABADIE v. COSTABADIE*.

1847: 25th, 26th, and 30th March.

A direction by will that the testator's widow shall receive all the income of his real and personal estate, and pay and apply the same to and for the use of herself and the children of their marriage, agreeable and according to her own discretion during her life, confers upon the wife a discretionary power, which the Court will not disturb so long as it is reasonably and honestly exercised.

Where the disposition of a trust estate amongst certain objects is made by the author of the trust to depend upon the discretion of the trustee, the court will, in a proper suit, inquire into the manner in which the trust has been administered, and require that such discretion shall be fairly and honestly exercised; and so long as it appears to be so exercised, the Court will not deprive the trustee of the discretionary power which he possesses, or assume itself the exercise of that power; but to avoid a repetition of suits, where there is reason to apprehend that the conduct of the trustee may be liable to question, the Court may require the discretion of the trustee to be exercised under its view.

JACOB COSTABADIE, by his will made in 1827, gave to his wife Anne all his real and personal estate for her life, upon trust, out of the rents, issues, interest, dividends, and profits to pay his debts and funeral and testamentary expenses, and a legacy of 1700*l.* to his daughter Frances, to be paid upon her marriage with the consent of his wife, or at the expiration of six months after his wife's decease, by her executors or administrators; and subject thereto, upon trust that his wife during her life should, out of the rents, issues, and profits of his real and personal estate, pay to all his sons, and his daughter Frances, the annuity or

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yearly sum of 50*l*. during the life of his wife, so long as his said daughter and sons should remain single and unmarried; and subject as aforesaid, the testator declared the trusts of his will as follow:—"Upon trust that my said dear wife shall receive all the rents, dividends, interest, and profits of all and singular my real and personal estate, and pay and apply the same to and for the use of her my said wife and the children of our marriage, agreeable and according to her own discretion, during her said life." And after the decease of his wife, the testator devised and bequeathed his real and personal estate upon trust, as to part thereof, for his eldest son, and as to the remainder, for his younger sons, as his wife should appoint. The testator died in 1828, and the will was proved by his widow. The testator left seven sons, Frances the daughter, who was then about twenty-five years of age, *and unmarried, and two other daughters, who had married in his lifetime. [*411]

The bill was filed in 1844, by Frances, the unmarried daughter, complaining that the widow of the testator, in order to save money out of the estate, had treated her children harshly, and that the plaintiff had for that reason, since the year 1838, been compelled to live with other members of her family, and partly to depend upon their bounty; that the defendant, the widow, claimed an absolute and irresponsible discretion in the administration of the trust; and that by a deed-poll, dated in January, 1843, she had appointed to the plaintiff an annuity of 10*l*., in addition to the annuity of 50*l*., given to her by the will, as all that, in the judgment of the defendant, was fit and proper to be allowed to the plaintiff out of the rents and profits of the estate. The plaintiff alleged that these sums were not sufficient to procure for the plaintiff those comforts and enjoyments to which she was accustomed during the life of the testator, and which the estate left by the testator was large enough to afford.

The bill prayed that an account might be taken of the rents, issues, interests, dividends, and profits of the real and personal estate of the testator possessed by Anne Costabadie, the widow, and of her application thereof; and that a competent portion of such income might be directed to be invested, to secure the pay-

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ment of the legacy of 1700*l*., and of the annuity of 50*l*., bequeathed to the plaintiff; and that the defendant might be decreed to appoint to the plaintiff such an annual payment, out of the clear residue of the said rents, issues, interest, dividends, and profits, as should appear to be proper in the circumstances of the case, and that the deed-poll of January, 1843, might (if [*412] *necessary) be declared to be an illusory appointment as to the plaintiff, and be set aside.

The other children of the testator were served with copies of the bill, under the 23rd General Order of August, 1841.

The answer of the defendant, Anne Costabadie, denied the harshness complained of, and insisted as well on the discretion which the testator had given her, as on the propriety with which it had been exercised. The defendant set forth the deed-poll of January, 1843, in which she had appointed various annual sums to all her children (including the 10*l*. per annum to the plaintiff,) reserving a power of revocation. The answer also stated, that a proposal had been made by the defendant to allow the plaintiff 40*l*. per annum, in addition to the legacy of 50*l*., and in lieu of the 10*l*. appointed by the deed-poll; and that such proposal not having been accepted, the defendant had offered to invest the legacy of 1700*l*. (which she had endeavored to raise out of the income of the estate) for the plaintiff's benefit, in addition to the 50*l*. and 10*l*., or to pay such an annual sum as would altogether amount to interest at 4*l*. per cent. on the 1700*l*. The defendant also submitted to the Court, the question whether she was not absolutely entitled to the income of the real and residuary personal estate, for her life, subject to the legacy of 1700*l*. and the annuities; and she submitted, also, that she was entitled to dower out of the estates of inheritance.

Mr. *Romilly* and Mr. *Bell*, for the plaintiff; and Mr. *Rolt* and Mr. *Glasse*, for the defendant the widow.

 1847.—*Costabadie v. Costabadie*.

*All the cases cited in *Thorp v. Owen*,(a) on the [*413] question whether a gift, accompanied by an expression of the motive or purpose, created a trust, and to what extent, were cited; and also, *Knight v. Boughton*,(b) *Brown v. Higgs*,(c) *Kemp v. Kemp*,(d) *Harding v. Glyn*,(e) *Liley v. Hey*,(f) *Page v. Way*,(g) *Leach v. Leach*,(h) *Bowden v. Laing*,(i) *Baleman v. Foster*,(k) and *Burrough v. Philcox*,(l) on powers in the nature of trusts. On the effect of a gift to a parent and children, *Chambers v. Atkins*.(m)

March 30th.—VICE-CHANCELLOR:—In the course of the argument I stated, that it appeared to me inquiries as to children must be made, and that the plaintiff must be entitled to an account of the residue; for that, to deny such an account, simpliciter would be to make the defendant the absolute owner; whereas it was not denied that the plaintiff had an equitable interest in the residue, though subject to a discretion in the defendant, her mother. I think still, that the plaintiff is entitled to such an account: but (at present, at least) to nothing more. As to the discretionary power given to the mother, I have several times had occasion to consider to what extent the Court would interfere with the discretion a testator may think proper to give to the trustee whom he appoints.(n) The testator may limit and circumscribe *the interests which he bequeaths to his [*414] children, as he may think proper, and the Court cannot enlarge the interest which he has given. If the gift be subject to the discretion of another person, so long as that person exercises a sound and honest discretion, I am not aware of any principle, or any authority, upon which the Court should deprive the party of that discretionary power. Where a proper and honest discretion is exercised, the legatee takes all that the testator gave, or intended that he should have,—that is, so much

(a) 2 Hare, 607

(b) 11 Cl. & Fin. 513.

(c) 4 Ves. 708; S. C. 8 Ves. 561.

(d) 5 Ves. 856.

(e) 1 Atk. 469.

(f) 1 Hare, 580.

(g) 3 Beav. 20.

(h) 13 Sim. 304.

(i) 14 Sim. 113.

(k) 1 Coll. 118.

(l) 5 Myl. & Cr. 73.

(m) 1 Sim. & Stu. 382.

(n) See *Cufe v. Bent*, 3 Hare, 245.

1847.—*Costabadie v. Costabadie*.

as, in the honest and reasonable exercise of that discretion, he is entitled to. That is the measure of the legacy. But, consistently with the plaintiff having an interest, subject to the mother's discretion ; she has a right to a discovery of the property, in respect of which the interest exists, and also a right to a discovery of all the acts which have been done, and the reasons for doing them, which the defendant may be able to give. She has that right, in order that the Court may be able to see whether the discretion which has been exercised by the party intrusted with it, is within the limits of a sound and honest execution of the trust. Beyond that, I am not aware, that, because a person who takes an interest in property subject to the discretion of another, is dissatisfied with the exercise of that discretion, therefore the Court will take it away from that party, and assume itself to exercise it. If a bill be filed, the Court will of course inquire into the acts which have been done in the administration of the trust, and may possibly (as has been done in many cases) require the trustee to exercise the discretion under the view of the Court. If the relief were not given in that manner, their might at each moment be a new case arising, and with it a new suit. I am not aware, however, that the Court has ever denied [*415] the right of a testator to give *a discretion, or deprived the trustee of it as a matter of course.

If this view of the case had been taken by the plaintiff's advisers, this cause would probably have been disposed of as a matter of course. The bill would then simply have stated the will, and the present position of the testator's family, and prayed the judgment of the Court upon the construction and effect of the will. But that view of the case has not satisfied the plaintiff, a circumstance much to be regretted, especially when the correspondence that has taken place between the parties is considered. The plaintiff, however, has filed her bill, and instead of stating the simple case I have mentioned, has made a special case. [His Honor read the allegations of the improper conduct of the defendant towards the plaintiff and the other children.] This statement has led to a consequence which was unavoidable ; it has put the defendant Anne to justify her conduct in dealing

with the property ; but as no evidence has been gone into by the plaintiff, in support of the allegations in the bill, I am compelled to deal with those allegations as having no foundation. The plaintiff says she abstained from going into evidence, in consideration for her mother ; the same consideration might well have led her to abstain from making the charges in the bill, by which much trouble and expense would have been saved. The correspondence, however, negatives the charges, if I except one letter from the defendant Anne.

The only thing that has struck me in reading the correspondence is, the apparent disproportion between the allowance made to the daughter and to sons. But this disproportion may be only apparent. The daughter lived a good deal with one of her brothers, and had the benefit of what he received from the widow : she *lived also with her sisters sometimes, [*416] and with her mother sometimes. There may be sufficient reason for making a difference between the provision for sons and for daughters, the sons requiring greater pecuniary assistance to prepare for their entry into business or professions. The sons certainly appear, by the statements in the answer, to have been drawing largely upon their mother. With regard to the plaintiff, I can find no reason but her mere will for her ceasing to reside with her mother ; but I do not see that she has any right, by this wilful separation, to straiten the means at her mother's disposal for providing for the sons.

I refer to these matters, for the purpose only of showing that it is impossible, upon the materials now before me, to do more than I should have done upon a simple bill, asking for nothing more than an account and a declaration of right.

Direct inquiries as to the children of the testator, and if all the children are parties, take the usual accounts of the estate, and ascertain the residue ; and, at the request of the widow, inquire whether she is entitled to dower out of any, and, if any, what part of the testator's estate. Inquire what provision ought to be made for raising the 1700*l*, with liberty to report as to any proposal the widow may make for the future application of the income amongst herself and the children ; and to state special circumstances. Reserve further directions and costs.

1848.—Mower v. Orr.

[*417]

*MOWER v. ORR.

1848: November 25th.

The circumstance that infants are residing in two different parts of the kingdom, is not a sufficient ground for dispensing with the practice for assigning a guardian *ad litem* by a commission, or upon their appearance.

MR. FRITH moved to appoint a guardian *ad litem* of two infants, without a commission or their appearance in person—one of them residing in Brighton, and the other in Derby. The suggestion was, that the order would save expense.

The VICE-CHANCELLOR said there was nothing special in the circumstance mentioned to require the usual practice to be dispensed with, and

The order was refused.

See *Baynton v. Hooper*, 10 Beav. 168, where all the cases on the point are referred to.

1848.—Downs v. Collins.

*DOWNS v. COLLINS.

[*418]

1848: 28th and 29th February; 1st, 2nd, 8th March.

Articles of partnership between two partners as brewers, malsters, &c., covenanting with each other that they and their respective executors and administrators would continue partners for twenty-one years, determinable upon the death of both partners, unless their respective representatives should agree to continue the business for the residue of the term; and empowering either partner to sell his share in the partnership property, (offering it first to the other partner,) so that the purchaser should not be entitled to the possession of the partnership property until the expiration of the partnership, without the consent of the other partner; empowering, also, each partner either in his lifetime or under his will, to introduce one or more relations, being sons, brothers, or nephews, into the partnership, to take all or a portion of his share, during the continuance of the partnership; and providing, that, in case of the death of either or both partners during the term, after having introduced such relation, the person so introduced should be considered as the original partner; providing, also, that in case of the death of either partner during the term, without having introduced such relation, the business should be carried on by the surviving partner, and the executors, administrators, or trustees of the deceased partner; but making no provision for the case (which happened) of the death of one partner during the term, and his executors or administrators refusing to be concerned in the business with the surviving partner, and calling for an immediate dissolution, and a sale and distribution of the partnership property, the surviving partner not consenting to such dissolution or sale:—*Held*, in a suit by the executors of the deceased partner against the survivor, for a dissolution, that the provisions in the articles for the continuance of the partnership during the term of twenty-one years could not be enforced in equity by way of specific performance of the partnership contract against the representatives of a deceased partner, either by way of relief in a suit in which such surviving partner was plaintiff, or by way of protection in a suit in which he was defendant: and, inasmuch as the articles could not be so enforced, the plaintiffs, the executors of the deceased partner, repudiating the partnership, were entitled to a decree for a dissolution; but that such relief would be given to them in equity, subject to any legal right which the surviving partner had, to recover damages against the executors of the deceased partner for a breach of the covenants contained in the articles; and that the amount of any damages which might be recovered in such an action must be added to the credit side of the account of the surviving partner, to be taken under the decree.

The option reserved to the executors of the deceased partner to enter into the partnership with a surviving partner must be accompanied by the obligation on the part of the surviving partner to admit them; and, unless the option be confined to the representatives of the partner who shall die first, the sur-

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viving partner must have the option of entering into the partnership with the representatives of the deceased partner, with the same accompanying obligation on their part to admit him.

Specific performance of a partnership contract for an absolute term of years, leaving undefined the amount of the capital, and the manner in which it is to be provided, the mode of carrying on the business being discretionary,—cannot be enforced in a Court of equity; and the Court, being unable to enforce the entire contract, will not enforce it in part, as against the representatives of a deceased partner, by refusing them a decree for the dissolution of the partnership and the sale of the property, which had, under the contract, been specifically devoted to the partnership business.

EDWARD COLLINS and John Downs, brewers, lightermen, maltsters, and corn-dealers at Richmond, entered into articles of partnership, dated the 29th of December, 1840. The articles recited that they had carried on the said business in partnership, since the 24th of June, 1837, without regular articles; that they were lawfully or equitably seized or possessed, in equal shares as tenants in common, of and in the brew-house, malting house, and premises in Richmond aforesaid, in which the said trader and businesses had been carried on, and also of and in divers freehold and leasehold public-houses and premises in Richmond aforesaid, and elsewhere in the counties of Surrey and Middlesex, which were used by the said Edward Collins and John

Downs in the way of the trades or businesses of the [*419] *partnership, and were particularly enumerated in a schedule to the said articles; and that the said Edward Collins and John Downs were also possessed, as part of their partnership property, in equal shares, of the implements and utensils of trade, plant, machinery, live and dead stock, book-debts, and other articles and things belonging to the said trades and businesses; and that the said Edward Collins and John Downs had advanced certain sums for the purpose of the said partnership, and had agreed that the partnership should be continued for the time, and upon the terms and conditions, thereafter expressed. The articles then witnessed, that the said Edward Collins and John Downs did each of them, for himself, his heirs, executors and administrators, in the manner following, (that is to say):—1. That the said Edward Collins and John

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Downs respectively, and their respective executors and administrators, shall and will continue to be partners in the said trades or businesses of brewers, malsters, and dealers in coals, and all matters, transactions, dealings, and things relating thereto, for the term of twenty-one years from the 24th of June, 1837, upon the terms and conditions thereafter contained, subject, nevertheless, to be sooner determined, pursuant to the provisions in that behalf hereinafter contained; but, upon the death of both of the said parties, the said partnership shall be dissolved and determined, unless the representatives of the deceased partners respectively shall, within the space of two calendar months after the decease of the partner who may survive, agree to continue the same during the then residue of the said term of twenty-one years. 3. That all the said brewing-house, malting-house, public-houses, and premises, shall, at all times during the continuance of the said partnership, be kept and used as partnership property, but shall nevertheless belong *to [*420] the said partners in equal portions as tenants in common, and be considered as real estate; and the said implements and utensils of trade, plant, machinery, live and dead stock, book-debts, and other articles and things belonging to the said trades or businesses, shall belong to the said partners as partnership property, in equal shares as tenants in common. 4. That the profits and benefit arising from the said trades or businesses, and also the rents of the said public-houses and premises, and the moneys, goods, debts, estates, and effects whatsoever, which from time to time shall be in or due or belonging to the said partnership, shall, at all times during the said partnership, belong to the said parties in equal shares and proportions. 5. Rents, taxes, disbursements, and losses, during the partnership, to be paid and borne out of the profits; and, in case of deficiency, by the said partners in equal shares, out of their respective separate property. 6. John Downs to have the sole control and management, and Edward Collins to act and assist under his directions; but this clause not to apply to any other partner to be introduced by John Downs. 10. Neither of the said parties, without the consent of the other, to enter into contracts for purchasing or rent-

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ing any house or building, or sign the certificate of any bankrupt, or compound, release, or discharge any debt which shall be due or owing to the partners, except such sums only as shall be *bona fide* brought into the cash of the partnership. 11. Each partner to be answerable for, and make good to the cash of the partnership, all sums of money which he shall actually receive, or for which he shall, without such consent as aforesaid, give any receipt or discharge, or sign any certificate, at such time as he shall not be the sole surviving or sole acting partner. 13. The premiums of apprentices to be taken by the parties, or either of them, to be deemed part of the capital of [*421] the joint stock, and allowances to be made to the *party boarding and lodging such apprentices; and in case of the death of either of the said partners during the term of any such apprenticeship, the survivor of the said partners to keep and maintain every such apprentice until the end of his apprenticeship, and to be allowed for the same out of the partnership effects. 14. Each of the partners, his executors and administrators, to have access to all the partnership books, notes, securities, writings, &c., without hindrance or denial from or by the other of them, his executors or administrators, and the same not to be carried away from the usual place of deposit by either of the partners, his executors or administrators, without the consent of the other of them, his executors or administrators. 15. Each partner to receive interest at 5*l.* per cent. for money left in or advanced with the consent of the other partner, his executors or administrators. 16. The partnership accounts to be settled and signed up to the 24th of June in every year. 17. Sums to be drawn out of the profits per month by each party. 18. That it shall be lawful for each or either of the said parties, at any time during the continuance of the said partnership, to sell or otherwise dispose of his share and interest of or in all or any part of the estates and property belonging to the said partners as tenants in common, so that the party wishing to sell or dispose of the same shall give the other partner the first offer of becoming the purchaser, at a fair valuation, to be made in the usual manner; and in case such other partner shall, within one calendar month after the same shall be

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offered to him, decline purchasing the same, then such partner so desiring to sell or dispose of his share and interest shall and may sell and dispose of the same to any other person or persons, so that the purchaser or purchasers of the same property shall not take or be entitled to the possession of the same estates and property until the expiration or other sooner

*determination of the said partnership, without the consent of the other. 19. That it shall be lawful for each [422]

or either of the said partners, his executors or administrators, at any time or times during the continuance of the said partnership, either in the lifetime of such partner or partners or by his last will and testament, and if during the life of the said partner, then on giving six calendar months' previous notice in writing of such his or their intention to the other of the said partners, to introduce one or more of his sons, or a brother or brothers, nephew or nephews, into the said partnership, so as such son, brother, or nephew be not under the age of twenty-one years, and so that he or they shall take the share only or a portion of the share of his or their father, brother, or uncle in the said partnership, and shall in all respects, for the residue of the continuance of the said partnership, be bound by and agree to observe all the covenants, agreements, and provisions contained in these presents, except the present provision for the introduction of any son or sons, brother or brothers, nephew or nephews, into the said partnership; and, also, upon the death of any such son or sons, brother or brothers, nephew or nephews, who shall be so introduced into the said partnership, to introduce in like manner any other son or sons, brother or brothers, nephew or nephews, in his or their place or stead. 20. That, in case of the death of either or both of the said partners before the expiration of the said term of twenty-one years, and after having introduced any son or sons, brother or brothers, nephew or nephews, into the said partnership, under the provisions lastly hereinbefore contained, who shall at the death of such partner be in the same partnership, such son or sons, brother or brothers, nephew or nephews, shall, from the death of such partner, (being his or their said father, brother, or uncle,) be and be considered as the original partner or

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[*423] partners, under these presents, *in lieu of such deceased partner, as shall, as between the said parties thereto, become entitled to the whole of such deceased partner's share in the profits of the said partnership trades and business, and shall be bound by all the covenants, clauses, provisions, and agreements contained in these presents, on the part of such deceased partner, for the then residue of the said term of twenty-one years therein, if such son, or brother, or nephew shall so long live, (except the said 19th clause hereinbefore contained :) but nothing herein contained shall prevent either of the said partners from disposing of his or their beneficial interest in the said co-partnership business and estates, by his or their respective last will and testament, in such way and manner, and to such person or persons, as he or they respectively may think proper; the power of sole control and management reserved to John Downs during his life not to extend to any person or persons to whom he may sell, give, devise, or bequeath his share, or any part thereof.

21. That, in case of the death of either of the said parties to these presents during the continuance of the said term of twenty-one years, leaving a son or sons, brother or brothers, nephew or nephews, him surviving, and without having introduced into the said partnership, under the provision hereinbefore contained, a son or sons, brother or brothers, nephew or nephews, who shall then be living and in the said partnership, then and in such case the said trades or businesses shall be carried on by the survivor of such partners, and by the executors or administrators, or by such other person or persons as shall be appointed by the deceased partner by his last will and testament as trustee or trustees for that purpose, until some son or sons, brother or brothers, nephew or nephews, of the deceased partner shall have attained his or their age of twenty-one years, or, which shall first happen, until the expiration of the said term of twenty-one

[*424] *years; and that in the meantime, and until such son or sons, brother or brothers, nephew or nephews, shall be introduced as aforesaid, the conduct and management of the trades or businesses of the said partnership shall devolve upon the surviving partner and the said trustees, executors, or administra-

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tors of the deceased partner ; and that one half of the profits of the said partnership trades or businesses shall belong to the surviving partner, and the other part thereof to the said trustees, executors, or administrators, to be by them applied and disposed of in such manner as the deceased partner shall, by his last will and testament or otherwise, have directed ; and, in default thereof, for the joint and equal benefit of the widow (if any) and children of such deceased partner ; or, if there shall be no widow or child, as part of the personal estate of such deceased partner : and, also, that the son or sons, brother or brothers, nephew or nephews, to be appointed by the will of his or their deceased father, &c., shall be admitted into the said partnership for the residue of the term of twenty-one years, in the same manner in all respects as if his name had been inserted in these presents instead of the name of his father, &c., who is a party hereto. 22. That, in case of the death of either or both of the said partners, if the survivor of them, or the executors or administrators of either of the deceased partners, shall, within twelve calendar months from the day of the decease of either of such partners, give unto the surviving partner, or to the trustees, executors, or administrators of such deceased partner, the particulars or terms, in writing, on which he, (the surviving partner,) or the trustees, executors, or administrators of either of the deceased partners, will withdraw from the said partnership trades or businesses, and if the said surviving partner, or the trustees, or executors, or administrators of either of the deceased partners, shall think fit to accept such terms, he and *they shall have full power and autho- [*425] rity so to do, and the surviving partner, or the trustees, executors, or administrators, of the deceased partners respectively, as the case may be, shall thenceforth cease to be a partner or partners or have any further share or interest in the said partnership trades or businesses, and the same shall thenceforth wholly belong to the said surviving partner, or to the trustees, executors, or administrators, as the case may be ; and, in the latter case, the same shall be in trust for such person or persons, and in such manner, and on such terms as the said deceased partner or partners respectively shall, by his respective last

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will and testament or otherwise; direct; and for want thereof, in trust to be applied as part of the residue of the estate and effects of the deceased partner or respective deceased partners. 23. That nothing in these presents contained shall prevent, or in any manner be construed to deprive or prevent, the said Edward Collins and John Downs mutually, or the survivor of them, and the executors or administrators of the deceased partner, or the executors or administrators of each of the deceased partners, and with their joint approbation, before any son or sons, brother or brothers, nephew or nephews, shall be introduced into the said partnership under the provisions hereinbefore contained, and after such son or sons, brother or brothers, nephew or nephews, shall have been so introduced, then also with the joint consent of such son or sons, brother or brothers, nephew or nephews, to alter, vary, or determine all or any of the provisions hereinbefore contained, or to expunge any part of the same, or to alter the time for the continuance of the said partnership or the manner in which the same shall be carried on, or to determine and put an end to the said partnership, when and in such manner as they shall think proper, so as the same shall be done by some deed or writing to be duly signed [*426] and sealed by them respectively. *24. That if, at any time after the decease of either or both of the said partners, the surviving partner, and the trustees, executors, or administrators of the deceased partner or partners, or the trustees, executors, or administrators of both of the deceased partners, shall mutually be desirous of determining the said partnership before the expiration of the said term of twenty-one years, the said trustees, executors, or administrators of such deceased partners respectively, shall have full power and authority so to do, and from the time that shall be then agreed upon, the said partnership shall cease, determine, and be absolutely void to all intents and purposes whatsoever, anything hereinbefore contained to the contrary in anywise notwithstanding. 26. Upon the expiration or final determination of the partnership by effluxion of time or otherwise, the debts of the partnership to be paid out of its effects, or a fund set apart to answer the same; the effects,

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&c. to be sold, with liberty to either of the partners, his executors or administrators, to be the purchaser; the debts due to be collected by the partners or the survivor; and the surplus to be divided according to the respective rights of the parties; and thereupon, mutual releases to be executed by the partners, the survivor, and their executors and administrators, as the circumstances of the case might be; and the custody of the books, vouchers, &c. to be with the surviving partner, or if both should be dead, then as their respective representatives might agree.

The businesses were carried on by the partners until the death of John Downs, in July, 1843. John Downs, by his will made in April preceding his death, bequeathed certain pecuniary legacies to his daughters, and gave, devised, and bequeathed his said moiety in the brewery, stock, plant, and utensils, and of and in all *the freehold, copyhold, and leasehold inns, [*427] public and victualling houses, and beer-houses, buildings, hereditaments, and premises which he "purchased of Mr. Edward Collins," and of and in all other houses, buildings, and premises which he had purchased or taken, or should purchase, or rent, or take jointly with him, and of and in the several houses lately built by them, (the testator and Edward Collins) unto his two sons Henry and Edwin, as tenants in common, and to their several and respective heirs and assigns forever; and the testator, after disposing of his other real and personal property for the benefit of his widow and family, appointed his sons, John Henry, Henry, and Edwin, his executors. The will was proved by Henry and Edwin, the two sons to whom the partnership property was given beneficially.

The bill, which was filed by Henry Downs and Edwin Downs, as executors of John Downs, in January, 1845, stated, that Collins and Downs had during the partnership borrowed a large sum of money from the Union Life Insurance Company, which was charged, by way of mortgage, upon part of the partnership estate, and also upon parts of the separate estate of the testator, John Downs, and of the separate estate of the defendant Edward Collins: that Collins alleged that 33,825*l.* was due by the partnership to the said Union Company, and 22,848*l.* to other persons;

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that debts, chiefly unsecured, amounting to 20,480*l.*, were due to the partnership; that, upon an estimate of the value of the property of the partnership, and of its liabilities, it appeared that the former exceeded the latter only by about 4900*l.*; and that the defendant Edward Collins alleged he had in his hands only 221*l.* in ready money, for paying debts and carrying on the business.

The bill alleged, that the separate estate of the testator, [*428] John Downs, was *subject not only to a Crown debt incurred in the said business, but was also subject to separate debts and liabilities to a large amount, which the executors were unable to satisfy until the partnership affairs were wound up and the partnership debts paid, so that the separate estates in mortgage for the partnership debt might be exonerated; and that the defendant Edward Collins was unable to pay the partnership debts without the aid of the testator's estate. The bill also alleged, that the business had been improperly and improvidently conducted by the defendant Edward Collins since the death of the testator, John Downs.

The bill prayed, that the partnership might be declared to have been dissolved by the death of the testator, John Downs, or, if not, that it might now be dissolved, and an account of the partnership dealings and of the partnership estates and property taken; that such estates, and property, and the good will might be sold, and the partnership debts paid: but if the Court should be of opinion that the defendant Edward Collins was entitled to carry on the business, then that he might be restrained from carrying it on in an irregular or improper manner; that an account might be taken of the profits due to the testator, John Downs, at his death, and of the profits made by the defendant Edward Collins since that time; that the separate and private estate of the testator, John Downs, might be exonerated by the partnership assets from all mortgages executed by the testator for the benefit of the partnership; and that what should be found to be due to the estate of John Downs might be paid to the plaintiffs.

The widow of the testator and his son John Henry Downs were made defendants to the bill, in respect of their inter-

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*est under the will in the separate property of the testator, subject to the mortgage for the partnership debt. [*429]

The defendant Collins by his answer, insisted upon his right under the articles to carry on the business, as surviving partner, until the expiration of the term of twenty-one years, offering to perform the covenants contained in the articles on his own part. He denied that the partnership had become dissolved by the death of Downs, or that it ought now to be dissolved, or the business wound up, or the property sold: he denied that there was anything in the state of the assets of the concern to prevent the business from being carried on in a proper manner; and alleged, that since the death of Downs he had reduced the debts owing by the concern (other than the mortgage debt) from 23,600*l.* to 16,400*l.* The defendant also alleged, that he should be able to satisfy the partnership debts out of the property of the concern, without resorting to the separate estate of Downs; but he insisted that the separate estate of Downs, which was subject to the mortgage, was not, under the partnership contract, entitled to be exonerated by a sale of the partnership property, before the expiration of the term. The allegations of improper management of the business were denied.

Mr. Romilly and Mr. Prior, for the plaintiffs.

The parties to the partnership contract evidently intended, in case they should both live until the end of the term, or their executors or administrators should agree to continue the business, or if sons, brothers, or nephews should be substituted, that the partnership should subsist *for the twenty-one years; [*430] but there is no provision in the articles that the business shall be continued with the assets of one of the partners after his death, unless his representatives or appointees take his place as partners in the firm. If no representative of a deceased partner were willing to take his place, and no person were appointed under the power contained in the articles, the case was left to the operation of the ordinary rule of law, by which the

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partnership became dissolved: *Kershaw v. Matthews*.^(a) The question then would be, whether the representatives of the deceased partner were bound to become partners, and thereby render themselves liable, as to the rest of the world, to the bankrupt laws and the other consequences of being members of a trading concern: *Waugh v. Carver*.^(b) There was nothing in the articles which obliged the executors to take upon themselves these personal liabilities. The articles gave them the option of doing so, but nothing more; and that option they were at liberty to decline, as they had declined: *Madgwick v. Wimble*.^(c)

Mr. *Steele*, for the defendants the widow and son of Downs.

Mr. *Rolt* and Mr. *Schwyn*, for the defendant Collins.

The question in this cause, which was a matter of mere convenience to the plaintiffs, with reference to the administration of the estate of which they were executors and trustees, was a matter of vital importance to the defendant Collins. The defendant had invested his property in this partnership, which it was intended should continue for twenty-one years; he had agreed to give the entire management and control of the [*431] *business to the deceased partner, who had also brought a large sum of money into the concern; the deceased partner had the benefit of that agreement, so long as he lived. The provision was, that, upon his death, the management should devolve jointly upon the surviving partner and the representatives or appointees of the deceased partner: the representatives of the deceased partner insisted that they were then entitled to break up and dissolve the concern. If this were the contract between the parties, the defendant must submit to it, but it was plainly not the contract. The entire frame of the articles and the dealings of the parties showed that they had contemplated and bargained for an absolute term of twenty-one years: the power to substitute relations, to sell their shares, and to preserve the interest in the trade to the representatives of a deceased

^(a) 2 Russ. 62.

^(b) 1 Smith's Leading Cases, 491.

^(c) 6 Bea. 495.

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partner, all manifested that the death of either partner was not to dissolve the partnership. The borrowing money for seven years absolutely, and other acts of the partners, were evidence of their own construction of the agreement. It was not denied that this might be so, if the parties had lived; but it was said that the case was different where one of the partners had died, and the right to dissolve was insisted upon by his executors against the surviving partner. But the executors could not be in a better situation than the partner himself; if he had no such right, how could his executors acquire it? They must be bound by the contract of their testator. It was alleged, that, having entered into no personal covenants, as the testator had, the executors were not bound to incur the personal liability which would arise from becoming partners in the business. There was no necessity for their incurring any such personal liability. The executors might, in their representative character, confer with the surviving partner on the subject of the trade, contribute out of the estate so much as the testator *would [*482] have been bound to contribute, and receive on behalf of the estate the proportion of the profits coming to it, without being personally partners. Even if the executors were bound by the contract to become partners personally, there would be no hardship, for they were under no obligation to take upon themselves the character of executors; they might have renounced. The office was voluntarily assumed, and the legal liability must follow. It was common for executors in that character to become liable to the covenants of leases and other obligations, which they could only escape by renouncing the office. It was not said, however, that it was wholly for the relief of the executors personally that the suit was instituted; it was said to be mainly for the benefit of the parties interested in the testator's estate; but who were these parties? They were creditors or volunteers. If the latter, they had no claim until every debt and duty of the testator was discharged. If creditors, they were entitled to be paid subject to the other obligations which the testator had contracted in his lifetime, and had no title paramount to those

 1848.—Downs v. Tollins.

obligations. The 18th clause of the articles provided for the sale of the interest of a partner in the concern, and there was nothing to prevent the executors from acting under that clause, and selling the interest of their testator. If, however, there were a difficulty in compelling the executors of a deceased partner to take an active part, either personally or by means of the testator's estate in their hands, in the prosecution of a trade, still there was no reason why the partnership property belonging to the estate of the deceased and the surviving partner, and already specifically embarked in the concern, should not continue to be so employed until the end of the term. The defendant has purchased the right to have the use of the assets of the partnership in [433] carrying on the trade for the term of *twenty-one years, and there was no difficulty in ascertaining and applying that particular property, at least, to the purposes for which it had been dedicated by the partnership contract. The plaintiffs had endeavored to show that the state of the concern in point of funds was such that it could not be profitably carried on. It might be admitted, that the last year or two had been less favorable than former years; but the occurrence of one or two unproductive years afforded no reason for breaking up the concern in violation of the original contract between the parties. The plaintiffs, who had given no aid to the surviving partner, were certainly not entitled to use the difficulty which that withdrawal had partly occasioned, as a ground for dissolution. If any doubt were entertained as to the sufficiency or necessity of the present amount of partnership property, for carrying on the business, that question might be made the subject of inquiry. They cited *Piggott v. Bagley*,^(a) *Morris v. Harrison*,^(b) and *Crawshaw v. Maule*.^(c)

VICE-CHANCELLOR :—The first question is, what is the con-

(a) M'Clel. & Y. 569.

(b) Col. P. C. 157, cited Collyer on Partnership, 151, 2d ed.

(c) 1 Swanst. 495, 521.

1848.—*Down v. Collins.*

tract between the parties contained in the articles? and the second is, (the first being answered,) what decree the Court should make under the circumstances of this case?

After reading the articles through repeatedly, I certainly have no doubt upon the first question, that the parties, when they signed those articles, intended to bind, and conceived that they had bound, themselves to carry on the partnership for the term of twenty-one *years absolutely. If they had [*484] intended nothing more than to constitute a partnership for that time, they probably would have gone no further than is usual in such cases,—to agree for themselves, their executors, administrators, and assigns, that they should be partners for the term of twenty-one years; and in that case no difficulty would have arisen here. It appears, however, that the parties beyond this had another object in view, for each desired to have the power of providing for a son or sons, brother or brothers, nephew or nephews, and, therefore, each stipulated for the power of transferring the whole or any part of his share to any of such relations. One article provides, that, even after the appointment of any one of these persons, if the persons so appointed should die, the original partner should have a power of appointing another person, falling within the degree of relationship mentioned, to succeed him. I have no doubt that the intention of the parties was to preserve to each of them this power of substitution.

Now, if the partnership had been simply a partnership for twenty-one years without any further provision, it is clear the death of either partner would have determined the partnership, and it was necessary, therefore, that some special provisions should be introduced, in order that any sons, brothers, or nephews, who might be brought into the concern, should have the benefit of the partnership so long as it should continue. In framing those provisions it appears to me, that the parties have assumed throughout that the purposes they had in view would require the partnership to continue for an absolute term, and that by some means or other it would so continue; and that they did not consider what the circumstances of the case would

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be in the event of any of the appointees declining to
[*485] become *partners, or in the event of no appointment
having been made.

The first article fixes the term of twenty-one years, subject, nevertheless, to be sooner determined pursuant to the provisions in that behalf thereafter contained. With respect to those words, I do not find any provisions that import that the partnership is to be determined upon the death of either partner. Then follows a clause to this effect ;—although they have agreed that the partnership shall be carried on for the whole term of twenty-one years by them, or by their respective executors and administrators, that, upon the death of both partners, the partnership shall be dissolved, unless the representatives of both shall agree to carry it on,—a clause which, coupled with what afterwards follows, manifestly points to the case of both having died without appointing any son or sons, brother or brothers, nephew or nephews, to succeed. The effect of the provision in case of the death of both partners is material, as it gives the executors of the parties, filling a fiduciary character, power, if they think fit, to carry on the business, which of course would be an indemnity to them for their so doing. Stopping therefore at that point, notwithstanding anything that comes after the first clause, I think that clause must be construed as an agreement between the two, for the purposes of the articles, that the trade shall be carried on ; and there is nothing in the subsequent stipulations which (except by operation of law) would have the effect of dissolving the partnership.

Now the events were these :—At the time of the testator's death his sons were all of age, and the sons and executors declined to have anything to do with the partnership, which,
[*486] they say, cannot profitably be *carried on. In what position then does that place the other party ?

It was said, that the power to appoint, and the power for the executors to carry on the concern, was a mere option given to the executors of a deceased partner. I admit that these provisions may have nothing more than the effect of giving an option, and that the party to whom the option is given is not

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compellable to enter into the partnership; but the effect of exercising that option must be, that the other party is compellable to admit him: the option on the one side cannot exist without the obligation on the other. The option in this case is given to each of the partners, and, therefore, the representatives of Downs have an option to enter the partnership, and Collins is compellable to admit them. As to Collins, he also must be entitled, as against those who represent the other party, to compel them to admit him. Admitting, therefore, that it is a mere option as far as relates to the party coming into the concern, yet the other party in either case must be compellable to admit the coming-in partner, which is the point that creates the difficulty in the present case. Mr. Collins insists that he has a right either in his own person to carry on the concern, or to have the testator's executors or appointees to carry it on with him. He exercises that option. He must, in fact, have a right to the benefit of the concern, and to have it so carried on. If that be not the construction of the articles, the unavoidable consequence is, that the power which is in terms given to each to appoint a person to succeed him, is in effect only a power given to the partner who should first die. If the case be, that the executors or family of Downs refuse to have anything to do with the concern, and if the executors of Downs should sell all his leasehold property which is engaged in the concern*and refuse to [*487] contribute capital in any way for carrying it on, it appears to me it must be left to a Court of law to determine whether an action will not lie by Collins against the executors of Downs to recover damages for that breach of covenant. The question is, how the case is to be dealt with in this Court.

There is no express provision for the event which has happened; at the same time, if the terms of the partnership had been definite, I do not know why the Court should not have given to Collins the benefit of that for which the articles stipulated. I see nothing in these provisions which a court of justice will not execute if it can. A man may covenant, for example, that his son after his death shall do certain acts, or that his wife shall levy a fine, or otherwise bind himself for the acts of others; but

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those parties cannot afterwards be compelled to do the act contemplated, and the covenantor looks to the assets of the covenantor, if the person who is required to do the act declines to do it. But if no provision is made for the amount of capital to be used in this partnership, and if any of those other matters, which are not provided for, be mere matters of discretion and agreement between the parties, it appears to me to offer an insuperable difficulty in the way of holding that the estate of Downs is bound to continue in the partnership with Collins or his appointees.

One argument was used on behalf of the defendant Collins, which, for the moment, struck me as possibly meeting [*438]. one difficulty in the case. It was said, supposing *it to be a case in which the Court was called upon to decree specific performance in favor of Collins, Collins might say, that although he could not have what he was entitled to under the articles, still he was entitled to take as much as he could get; that he was entitled, as against the estate of Downs, to have capital brought into the concern in due proportion, and to have the concern carried on in partnership down to the end of the term; but that, if he could not get the full benefit of those provisions, or have the assistance of the executors of Downs and of his capital, still he might have the use of the leasehold property in question; he might take it as being property in specie. It appears to me, that there is considerable difficulty in holding that that is the correct view of the case; for unless the position of the parties can be defined with something like accuracy, it is impossible for me to say, whether I am or not, in truth, giving the defendant something which is quite inconsistent with that which it was originally intended between the parties he should have: and that will come round to precisely the question I have already adverted to, namely, whether the contract between the parties is sufficiently defined for the Court to be able to decree its specific performance,—which I should in effect be deciding, if I were to dismiss this bill.

There is, then, the other question, which, if I should be of opinion in favor of the plaintiffs, would still not be wholly free from difficulty. Assuming that I cannot compel the executors (which,

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of course, I cannot) to become partners personally,—if I cannot give Mr. Collins that species of benefit contemplated by the contract entered into with the testator, the estate of the testator may be liable to an action; and the parties now suing in this Court are the very persons who would be liable *to Mr. [*439] Collins in that action. The Court, if it gave the plaintiffs a decree for dissolution, and an account of the testator's property in the business, must have regard to the fact, that the parties who are seeking to recover might be debtors by covenant in respect of this very property they are seeking to take from the other partner.

8th March.—VICE-CHANCELLOR:—I stated at the close of the argument, that the intention of the parties to the articles of the 29th of December, 1840, to become partners for an absolute term of twenty-one years, if they or their appointees should so long live, appeared to me to be clear. Independently of the observations I then made, the express provision in the first article, that, upon the death of both partners (which must mean their death without having appointed successors,) the partnership should cease, shows that the term, according to the articles, has not ceased on the death of Downs only; but here the difficulty begins. Admitting that the articles do sufficiently express that particular intention, (and excluding the difficulty arising from the refusal of the executors and the family of Downs to have anything to do with the concern,)—are the articles such as a Court of equity can enforce, or is not the case one in which this Court upon its ordinary principles, must leave the parties to their legal remedies? The latter is, I apprehend, the course the Court must take.

[His Honor stated the first and third articles.(a)]

Now, except that clause, and except a recital that both the partners had advanced some sums for the purposes of the

(a) *Supra*, p. 419.

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[*440] partnership, I find no agreement as to the *amount of the capital to be employed in the concern, or the manner of providing it or carrying on the concern. The pleadings throw no light upon the matter. This led me to inquire during the argument what amount of capital was actually employed in the concern, and by whom, or in what manner, it was provided; for the practice, in that respect, might have supplied what was wanting in the written articles. The statements, which the counsel for the defendant were instructed to make, confirm, as those statements were themselves confirmed by the evidence in the cause, namely, that such monied capital as was from time to time employed in this partnership, in brewing, malting, selling coal, and other matters relating thereto, was raised by means of bill transactions. Whilst Downs was living, the scale on which the concern was to be carried on might be determined from day to day, with the consent of the parties; but it is not suggested, that there was any agreement binding either party, or any rule by which a Court of equity can be guided in determining the question. The third article might be to some extent a guide for the business of the brewery, but not for the trades of malting, coal dealing, and other like matters.

I am satisfied that no useful result could possibly be obtained by inquiry upon this subject; it was not suggested by the defendant's counsel that any such result could be obtained. I see no alternative between the two courses, of leaving the defendant to his action upon the articles, or of protecting him from the breach of the articles with respect to the provisions contained in the third article.

I am satisfied that the former is the proper course to be pursued. Downs was not more in fault than Collins, for the omission of more definite provisions in the articles for the circumstances which have happened. It is a *casus omissus* [*441] in the articles, which appears to me to make a specific performance by a decree of this Court impossible. If Collins had been plaintiff, I must have refused him specific performance; and I cannot, because he is defendant, refuse to protect such rights as the plaintiffs have in Downs' estate.

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The decree, which I shall make, is a decree to this effect:—
The plaintiffs undertaking to pay what, if anything, shall appear due from the estate of Downs to Collins, on the account hereinafter mentioned, Declare, that the partnership was dissolved at the death of Downs. Take an account of the partnership's dealings and transactions, and the partnership property. The defendant Collins to be at liberty to bring such action as he may be advised for the breach of any covenant in the articles by Downs or his executors. The executors to admit their refusal to become partners, and also the withdrawal of Downs' share of the capital in the concern, and the defendant Collins to be allowed to set off such damages (if any) as he may recover in such action, against the amount (if any) which shall be found due from him by the Master, or the same to be added to anything which shall be found coming to Collins from the estate of Downs.

1848.—Emerson v. Emerson.

[*442]

*EMERSON v. EMERSON.

1848: 11th and 25th November.

Where a cause is, at the hearing, ordered to stand over, with liberty to the plaintiff to amend by adding parties, and no further proceedings are taken, the proper course for the defendant is to move, upon notice, that the bill be amended within a certain time, or that it be dismissed; and not to move that it be dismissed simply.

At the hearing of this cause in November, 1848, an objection for want of parties was taken and allowed, and the cause was ordered to stand over, with liberty to the plaintiff to amend by adding parties. The order was not drawn up; and no further proceedings having been taken,

Mr. *R. W. Moore*, on behalf of one of several defendants, moved to dismiss for want of prosecution, mentioning *Mitchell v. Lowndes*,^(a) *Dobede v. Edwards*,^(b) 1 Dan. Ch. Pr., Headlam's ed., 771, n.

November 11th.—The VICE-CHANCELLOR said, that, pending an order giving leave to amend, an order simply dismissing the bill would be irregular.

The same defendant then gave the plaintiff a further notice of motion, that, unless the bill should be amended within one week after the date of the order to be made thereupon, the same might be dismissed with costs.

November 25th.—Mr. *R. W. Moore* moved accordingly.

The VICE-CHANCELLOR made the order according to the notice of motion.

(a) 2 Cox, 15.

(b) 11 Sim. 454.

 1848.—*Manser v. Back.*

***MANSER v. BACK.**

[*443]

1848: 17th, 18th, 19th, and 20th January; 11th February.

Premises were advertised to be sold according to certain printed particulars and conditions of sale. Before the sale took place, several of the printed copies were altered by the vendor's solicitor, who introduced, in writing, a reservation of a right of way to other premises belonging to the vendor. Several of the altered copies of the particulars were laid on the table in the auction room, without any remark with regard to the alteration, and an altered copy was delivered to the auctioneer, who read the same aloud before the biddings commenced; but the party who became the purchaser did not hear or notice the alteration. The contract was signed by the auctioneer (inadvertently,) and by the purchaser, on a copy of the particulars of sale not containing the reservation. After the purchase money was paid and possession given, the purchaser filed his bill for a specific performance of the contract by a conveyance from the vendor, without a reservation of the right of way; and the bill was dismissed without costs.

An authority given to an auctioneer to sell may be revoked by the vendor at any time before the sale, and such revocation is valid against parties dealing without knowledge of it; therefore, in a suit by a purchaser to enforce specific performance of a contract entered into by the auctioneer by mistake or inadvertence, for the sale of property, as to part of which—a right of way over the land sold—his authority had been revoked, it is competent to the defendant to insist upon such revocation, and parol evidence is admissible in support of that defence.

THE vendors were owners of copyhold premises at Hoddesden, bounded on the west by the road from London to Ware, on the south by a lane called *Conduit-lane*, and on the north by premises called *Whitley's*. Part of these premises consisted of the Fox Inn, which adjoined the London and Ware road and Whitley's premises, and formed the north-western part of the premises belonging to the vendor. There was a right of way from Whitley's premises, along the back of the Fox Inn, to Conduit-lane, passing through the lot, the subject of this suit. The vendors gave directions for the sale of the above premises, with the exception of the Fox public-house and a small house adjoining it, and particulars were prepared by the auctioneer, describing the lot (being lot 11,) and reserving Whitley's right of way. At the auction, on the 30th of May, 1844, the plaintiff, and one Warner, became the purchasers; and on the evening of the same day,

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memoranda of this purchase, written on two copies of the particulars of sale, were signed, one by the plaintiff, for himself and Warner, and the other by the auctioneer. On the 7th of June, two other memoranda of the contract were signed, on similar copies of the particulars, the name of Warner being omitted, and the plaintiff becoming the sole purchaser. *The title was afterwards investigated, the purchase-money was paid, and the plaintiff was let into possession. But when the surrenders were prepared, the vendors insisted on the right of reserving a right of carriage-way to the back yard of the Fox Inn. Upon this the plaintiff filed his bill to enforce a surrender of the premises, without a reservation of such right of carriage-way.

It appeared from the evidence, that, after the original particulars and conditions of sale had been prepared and distributed, it was discovered that the reservation of a right of way to the back yard of the Fox Inn where there were stables and a coach or cart house, had not been made, and that there was no other access for carriages to those premises. The information of this fact was received in London, by the vendor's solicitor, on the evening before the day of sale, and he immediately altered a copy of the particulars of sale, by introducing a reservation of the right of way to the Fox Inn after the reservation of the right of way to Whitley's premises. Fourteen or fifteen copies of the original particulars were altered in the same manner by his clerks. These copies were brought to the auction room; some were distributed, without observation, and the others placed together on the table, and, after the sale, the greater part of the altered particulars were taken away. The vendor's solicitor directed the auctioneer to sell according to the altered particulars. It was proved by the evidence of the vendor's solicitor and the auctioneer, that the auctioneer, before the sale took place, read aloud the altered particulars; and, on that part of the plaintiff, it was proved that several persons in the room did not hear or notice the reading of the alteration. The particulars of sale, on which the memoranda as to the purchase were signed, were the *original copies of the particulars, not containing the alteration.

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The auctioneer, in his evidence, stated that he had signed these particulars through inadvertence.

● Mr. *Russell*, Mr. *Romilly*, and Mr. *Giffard*, for the plaintiff.

Mr. *Kenyon Parker*, Mr. *Rolt*, and Mr. *Piggott*, for the defendant.

The authorities cited are mentioned in the judgment, from which the points argued will sufficiently appear.

Feb. 11th.—VICE-CHANCELLOR—after stating the facts to the foregoing effect):—

At the conclusion of the argument I stated my opinion, to which I adhere, that the original insertion of Warner's name did not affect the case, and that the terms on which the contract for sale was made, are ascertained, subject to the question which I reserved.

The title was investigated, but some points, not affecting his case, remained to be completed on the 28th of September, 1841. However, on that day, the balance of the purchase-money was paid, possession was given to the plaintiff, and the conveyance alone remained to be executed. In order to state, in the clearest way I can, the question I have now to decide, I will suppose the dispute between the parties, which in fact arose some time afterwards in settling the conveyances, to have arisen on the same day on which possession was given, and the bill to have been filed immediately afterwards.

*Whatever the effect upon the case may be, it is in- [*446] disputable, that, at the time the auctioneer knocked down Lot 11, he had (as between himself and the vendors) no authority to sell except according to the altered particulars, provided the vendors' solicitor had authority to make the alteration.

The evidence of the witnesses as to what was said in the auction-room is of little value when given a long time after the

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sale, unless something very material occurred at the time to fix their attention. Where parties supposed that they already knew what was in the particulars, their attention was not likely to be very closely directed to what the auctioneer read, even if they intended to be bidders. If these observations should not be deemed satisfactory, it must be remembered how much greater force is to be given to the testimony of two credible witnesses, one of whom says he did read, and the other says he heard him read (both swearing to an affirmative,) than to the negative evidence of those who only say they did not hear him read a particular passage or clause. But I must give the plaintiff the benefit he claims of not having heard the auctioneer read the reservation of the right of the way to the Fox. Nothing but the most conclusive evidence could induce me to fix him with having heard it read. Not meaning to lay down any general rule, I say that, in a case like this,—after the circulation of the original particulars, and, looking at the manner in which the altered copies were dealt with, I must suppose the plaintiff came into the auction-room believing the sale was to take place without other reservation than was specified in the original particulars. No care was taken to correct that belief. The auctioneer should not have satisfied himself with merely reading the altered particulars; he should pointedly have called attention to [*447] the fact that they had been *altered, and in what way.

The onus of proving this distinct notice is wholly upon the vendors, and they have not discharged it. I shall therefore apply myself to the further consideration of this case, upon the hypothesis that the auctioneer read, but that the plaintiff did not hear him read, the new reservation.

Now with respect to the law which is to govern this case, I shall follow the arguments of counsel. Some of the points are clear. If the vendors had been plaintiffs asking a decree for specific performance, with an addition to the paper signed by Manser, such as they say ought to have been introduced, it is clear that no such decree could have been made. The evidence to prove the additional term would have been inadmissible. I notice this in passing, for the purpose of saying it is to a case

 1848.—*Manser v. Back*.

of this description that the case of *Jenkinson v. Pepys*(a) must be referred. From the statement of that case in *Higginson v. Clowes*,(b) it is manifest that Sir L. Pepys was the defendant, and that the evidence which was rejected was there adduced by the plaintiffs; and it is distinctly shown that such was the fact, by the citation of that case by the distinguished counsel in *The Marquis of Townshend v. Stangroom*.(c)

It is, however, a well-established principle of equity, that the Court will not enforce the specific performance of an agreement in writing, where, from fraud, mistake, or surprise, injustice would be done to the defendant by a decree for that purpose. And, therefore, where the terms of the written agreement have been ambiguous, so that, adopting one construction, they may reasonably *be supposed to have an effect [*448] which the defendant did not contemplate, the Court has, upon that ground only, refused to enforce the agreement: *Calverly v. Williams*,(d) *Jenkinson v. Pepys*,(e) *Clowes v. Higginson*,(f) *Neap v. Abbott*.(g) In the first three cases the plaintiff was the author of the ambiguity; but, in the last, the vendor, the author of the ambiguity, had the benefit of the principle, although it was certain the purchaser supposed he was buying all he claimed. The principle is, that it is against conscience for a man to take advantage of the plain mistake of another, or, at least, that a Court of equity will not assist him in doing so.(h) In the cases last cited, the Court was enabled to apply its principle without resorting to parol evidence. As the principle, however, is general, where the fraud, mistake, or surprise cannot be established without evidence, equity will allow a defendant, to a bill for specific performance, to support a defence founded upon any of those grounds by evidence dehors the agreement.

(a) Cited by Sir W. Grant, M. R., 15 Ves. 521; Id., by Sir J. Plumer, V. C., 1 Ves. & Bea. 528. See also 6 Ves. 330, in argument.

(b) 15 Ves. 516. (c) 6 Ves. 328, 331. (d) 1 Ves. jun. 201. See n. (48.) Id.

(e) Ubi supra. (f) 1 Ves. & Bea. 524.

(g) C. P. Cooper, 333. See the cases there collected.

(h) See Sugden, V. & P. 355, 11th ed.

1848.—Manser v. Black.

It is unnecessary to do more than refer to the cases cited by Sir Edward Sugden, (Vend. & Pur. pp. 157 et seq., 11th ed.)

The question is, whether the facts which I have treated as established in this case, bring it, in favor of the vendors, within the principle I have referred to. I think the answer must be in the affirmative. True it is, that the plaintiff, upon the supposition I now make, bona fide believed, and was justified in believing, that he had purchased that which he claimed by his bill. But if mistake, without fraud, be a ground for refusing a decree for specific performance, what more can be necessary than distinct and satisfactory proof of such mistake. That [*449] *the defendant, who undertakes to prove such a case, undertakes (as Lord Eldon said) a task of great difficulty, is not to be denied. But if the difficulty be got over by evidence so stringent that the Court may safely act upon it, why is not the principle to be applied?

It is not, upon the evidence, to be doubted, that the vendor's solicitor did, before the sale, alter the particulars in the way suggested by the defence, and distribute them in the sale-room. Nor is it to be doubted that he instructed the auctioneer to sell according to the amended particulars; nor that the auctioneer was bound to do so, and was limited by those instructions, provided the vendor's solicitor had authority to give them. Are the vendors in such a case to be bound in this court by the carelessness of the auctioneer, in a case in which (according to my present hypothesis) the situation of the purchaser is substantially unchanged? or is it not a case in which justice is best consulted by leaving the parties to their legal remedies? Principle and authority appear to me to show that the question must be determined in the defendant's favor.

It was said in argument, that, if there were any mistake, that mistake was all on the part of the vendors, and that all that had passed was, as regards the plaintiff, *res inter alios*, and not binding upon him. But that argument proves too much. If admitted, it would deprive a vendor of a power to revoke an authority to sell, unless he could prove that the revocation was actually known to the party who chanced to become the purchaser. This cannot

1848.—*Manser v. Black.*

be successfully contended for. The revocation of the authority of the auctioneer is operative *per se*, and therefore, like a deed, is binding *upon persons not parties to or consultant of it. From deference to the arguments of counsel, I have considered this case with reference to the cases upon mistake, as a ground of defence to a bill for specific performance. But the ground upon which the defence might most properly be rested is, that the auctioneer had no authority to sell, except according to the altered particulars. No doubt the evidence must be very clear to let in such a defence, but I cannot bring myself to doubt the truth of the defendant's case.

It was said, however, that the vendor's solicitor had no authority to make the alteration in question. That suggestion appears to me plainly inadmissible. The Fox Inn was not to be sold. It was therefore plainly the duty of the solicitor for the vendors to take care, that in selling the other lots, the Fox was preserved to the vendors. How, then, can it be successfully argued, that he would not have neglected his duty if he had so sold the property adjoining the Fox as to make the Fox untenantable? If the argument of the plaintiffs counsel on this point be right, the reservation could not properly have been inserted by the solicitor in the original particulars.

Bill dismissed, without costs.

 1848.—Pennington v. Buckley.

[*451]

*PENNINGTON v. BUCKLEY.

1848: 14th, 15th, 17th, and 24th November.

The circumstance, that a fund, in which a party takes a life interest under a will, is transferred by the executor to the trustees of that fund appointed by the will, is not necessarily and conclusively a severance of the fund from the bulk of the estate, unless the executor has, by such transfer, done all that it is incumbent upon him to do in the administration of the fund.

Upon a transfer to trustees of a fund bequeathed to them upon trust to pay the interest to a tenant for life, without any bequest of the corpus, or with a bequest thereof of doubtful validity, and which upon construction might fail, so that the corpus would ultimately become part of the residuary estate, the trustees of such fund are not, ipso facto, trustees for the residuary legatees or the next of kin, but the corpus of the fund must be regarded as assets of the testator's estate unadministered ultra the life estate.

The circumstance, that the residue of the estate (omitting the fund so vested in trustees for the tenant for life) has been administered in equity, does not affect the principle; nor is it less applicable, because, from the time which has elapsed since the death of the testator, the executor is not a necessary party in the administration of the particular fund, and has not been made a party to the suit.

Bequest for the benefit of unbeneficed curates, whose annual incomes do not exceed 35*l*, and to such as shall be recommended in a certain manner—*Held* to comprise two classes,—those having incomes of 35*l* and under, and also those recommended in the way prescribed.

J. C. LAUNDER, by his will, dated in 1801, after giving various legacies, charitable and otherwise, gave as follows:—

“I give and bequeath unto Mr. Thomas Jekyll Rawson, of Nottingham, and to Mr. John Exley, attorney in Castle-street, Holborn, in London, and the survivor of them, and his heirs, in trust, all the stock purchased by me and standing in my name in the Reduced 8*l* per Cents, as also the stock purchased by me and standing in my name in the 3*l* per Cents Consolidated Annuities, upon trust to pay the interest of them both to the above described Margaret Norton, during her natural life and whilst she continues single; but in case of her marrying or death, then my will and meaning is, that the said Thomas Jekyll Rawson and John Exley should transfer into the name of the Arch-

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deacon of Nottingham, and his successors for the time being, all my stock purchased and standing in my name in the 3*l*. per Cents Reduced, in trust, nevertheless, that he the said Arch-deacon, and his successors for the time being, do pay or cause to be paid the yearly interest of the said stock, as often as it becomes due, to such unbeneficed curates in the deanery of Bingham, Nottinghamshire, whose annual salary and income does not exceed 35*l*., and to such as shall be recommended to him by a plurality of voices of the beneficed clergy of the *deanery [*452] of Bingham, at his or his official's visitation annually held at Nottingham, after the following rate, (viz.,) to an unmarried curate 10*l*., to a married curate with a family 20*l*., and this to as many as the interest of the stock will admit of, after all contingent expenses are discharged; and my meaning is, that no curate shall receive this donation more than once, whilst remains in the said deanery any such curate who has not received the benefit."

And, in a subsequent part of the will, the testator declared, that if any of the charitable legacies or devises thereby left and bequeathed by him to any person or persons, use or uses, should fail taking effect through any flaw in law or other means, for the benefit or purposes for which they were designed by him, or if the business for which they were calculated should not be completed in the time limited after his death, then he desired that they should be considered as lapsed legacies, and the forfeitures of such sums of money should be equally divided between John Buckley and the wife of the Rev. Robert Thorp, (under no control of her husband,) whom he made his residuary legatees, and should belong to them and their heirs forever.

The will of the testator was proved in 1804 by Margaret Norton, the executrix; and, some time afterwards the executrix transferred into the names of the trustees, Rawson and Exley, the sums of 4418*l*. Reduced Annuities and 4400*l*. Consols, being stock which had been purchased and standing in the name of the testator. In the year 1805 a cause was instituted for the administration of the testator's estate; but it did not appear that any

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notice was taken of these sums in that suit. After the death of Margaret Norton which took place in 1845, the representatives of the last survivor of the *trustees, Rawson and Exley, filed their bill against the persons claiming to be entitled to the residuary personal estate of the testator, the Archdeacon of Nottingham, as the trustee of the charity, and the Attorney-General for the direction of the Court as to the distribution of the fund.

It was, at the hearing of the cause and on further directions, admitted by all parties, that there were no curates in the deanery of Bingham whose annual salary did not exceed 35*l*.

The VICE-CHANCELLOR, taking that supposition to be true, held, that the charitable gift of the Reduced Annuities was nevertheless good, inasmuch as he construed the bequest to be for the benefit of two classes of unbeneficed curates in the deanery, and not for one class with two qualifications: he considered the objects of the bounty, the "unbeneficed curates," to be an antecedent twice referred to; first, in the selection of such of them as had annual salaries not exceeding 35*l*, and, secondly, those having greater annual salaries, but having also the prescribed recommendation.

The question then arose as to the costs of the suit, the purpose of which was to deal with funds in the circumstances above stated.

Mr. *Walker* and Mr. *Simons* appeared for the plaintiffs.

The *Solicitor-General* and Mr. *C. Hall*, for the defendant the representative of Buckley, one of the residuary legatees, and Mr. *Rolt* and Mr. *Bates*, for the parties claiming under Mrs. [*454] Thorp, the other residuary *legatees, submitted—First, that the funds were separated from the general estate, and that the costs ought to be borne by the particular fund, and not by the residue: *Jenour v. Jenour*.(a) And secondly, that the

(a) 10 Ves. 562, 573.

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necessity of the suit, as to the particular fund, having been occasioned by the difficulty of construing the charitable gift, the costs ought to be paid exclusively out of the Reduced Annuities given to the charity.

Mr. *Wray*, for the *Attorney-General*, and Mr. *Lloyd*, for the Archdeacon, argued that the costs ought to be paid out of the residuary estate, as in *Wilson v. Squire*.^(a)

VICE-CHANCELLOR:—The testator, by his will, gave to trustees certain Reduced Annuities and also certain Consols, upon trust, for Margaret Norton, and after her death or marriage, upon trust, as to the Reduced Stock, for charitable purposes mentioned in the will; but made no disposition of the Consols after the death of Margaret Norton, except that which was contained in the residuary clause of the will, whereby the same, subject to the interest of Margaret Norton, would pass to the residuary legatees. The testator appointed executors, of whom Margaret Norton, the tenant for life, was one. Margaret Norton alone proved the will of the testator, in 1804, and afterwards (but when or under what circumstances does not appear) transferred into the names of the trustees the testator's Reduced Annuities and Consols.

The plaintiffs in the cause are the personal representatives of the survivor of the trustees of the above mentioned stocks, and became such personal representatives *in [*455] January, 1844. In April, 1845, Margaret Norton died; and in November, 1845, the present bill was filed for the purpose of having the direction of the Court in the distribution of the above-mentioned stocks. The defendants are, first, the Attorney-General, who claims the benefit of the charitable bequest; secondly, the Archdeacon of Nottingham, who may be described as a trustee for the charity; and thirdly, the persons claiming to be entitled to the residuary personal estate of the original testator. These defendants dispute the validity of the charitable be-

(a) 13 Sim. 212.

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quest, and claim both funds. My decision, at the hearing of the cause on further directions, was in favor of the charity as to the Reduced Stock, and in favor of the residuary legatees as to the Consols; and the point upon which alone (except a question as to the proper account to which a share of the Consols should be carried) I have now to express my opinion, is, in what way the costs of the suit are to be provided for.

It appears, that, on a former occasion, I intimated an opinion that the costs of the suit ought to be paid out of the Consols, as being part of the residue of the testator's estate still unadministered, but I did not decide the point. That opinion I was requested by counsel, on the occasion of the last argument in the present term, to reconsider. One thing, I apprehend, is clear; viz. that the most favorable decision I can make for the residuary legatees must be by directing an apportionment of the costs between the two funds,—admitting that the two funds are to be considered as severed from the bulk of the testator's estate, so as to throw the costs upon the severed fund, according to the common rule. There is no principle upon which I can throw the entire costs upon the charity portion alone. The costs [*456] of the suit have, in part, been occasioned in *making out the title of the residuary legatees, which was as necessary for the indemnity of the plaintiffs, as was a decision upon the charity question; and the claim of those residuary legatees to the Reduced Stock has failed. It is impossible, in such circumstances, to hold that the suit, has been occasioned by the charity question alone, or that the charity fund alone ought to bear the costs.

But can I go so far as this in favor of the residuary legatees? Ought not their share of the funds to bear the whole costs of the suit? This question I must try with strictness,—for it is one strictissimi juris, and I admit depends upon the question, whether, by the transfer of the two sums of stock to the trustees by Margaret Norton, that fund was so separated from the general estate as to make the trustees to whom it was transferred trustees for the residuary legatees after the death of Margaret Norton, or whether, notwithstanding the simple transfer alone, they were

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not, subject to the life interest of Margaret Norton, trustees for the executors of the original testator; that is, whether the remainder in the two stocks, subject to Margaret Norton's interest, did not remain assets unadministered, notwithstanding the transfer. I speak of the immediate and simple effect of the transfer *eo instante* that it was made. Now my opinion certainly is, that if Margaret Norton had died the day after the transfer, the trustees of the stock could not have been advised to distribute it without the sanction of the personal representative of the original testator; that, to a bill filed at that day by the trustees to administer the funds transferred to them, the personal representative of the original testator would have been a necessary party, and that such personal representative might have claimed the funds as assets unadministered, notwithstanding the simple transfer. The payment of a legacy while debts *are [*457] unpaid may furnish a just inference that there are assets to pay debts. But the transfer of the stocks by Margaret Norton to the trustees furnished no inference that the residue of the stocks might not be wanted for purposes having priority over the claims of the residuary legatees. Something more, therefore, as it appears to me, was wanted the day after the transfer, to entitle the residuary legatees to say that this portion of the testator's estate was so completely administered and separated from the testator's general estate and transferred to themselves, that the personal representative of the original testator had lost all dominion over it. The case is the same as if there had been a direction to set apart a sum of money to provide for an annuity for life, and no subsequent disposition of the fund had been made; would such an application of the sum, *ipso facto*, make the trustees of it trustees for the next of kin or the residuary legatees of the testator? I think it clearly would not.

The next question is, whether anything has since been done to alter the case in this respect. It appears that, in 1805, a suit was instituted by the residuary legatees of the testator against Margaret Norton, for the administration of the estate. A decree directing the usual accounts of the testator's estate was made, and, by the order on further directions, in 1810, the residuary

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estate was distributed amongst the persons entitled thereto, with the exception of the two sums of stock in question in this cause. As to those sums, the proceedings in the cause of 1805 are, as I understand, altogether silent. Those sums, and the transfer thereof by Margaret Norton, ought undoubtedly to have been the subject of charge and discharge by Margaret Norton; and if that had been done, the decree on further directions would in some way or other have provided for the mode of dealing [*458] with the stocks in question at Margaret Norton's death. But this was not done; this is a portion of the residue which has escaped notice; and the position of the stocks appears to me to have been unaltered by the proceedings in the suit of 1805; and if the case is to be tried strictly, nothing has yet been done which can be deemed an administration of the stocks ultra the life estate of Margaret Norton.

This, however, leads to a conclusion not desirable for any party; that is, that this suit is improperly framed, and that the executor of the original testator was a necessary party to it: not, as in *Jenour v. Jenour*,^(a) for the purpose of getting costs out of the general estate, in a suit to decide a right relating to a part of that estate clearly severed from it; but because this part of the estate has not been administered at all, either by the executors before suit or by the Court in the suit of 1805. The right of the residuary legatees to the Consols is without doubt constructively decided by the order on further directions in the suit of 1805; but the stock is unadministered, unless the transfer alone had that effect, upon which point I have already expressed my opinion.

If the executor were a party, I think the case would fall under the ordinary rule, and the costs would come out of the Consols as part of the general estate. There can be no doubt of this, if I am right in treating them as unadministered. The question, then, is, whether, in point of form, I can act upon this principle in the absence of the executor of the original testator, whose interest the argument assumes, and at the same time deal with

(a) 10 Ves. 573.

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the question of costs as if he were present. It is now nearly fifty years since the testator died, and nearly forty years since the order on further directions in the suit of 1805.

*After that lapse of time it is only a question of form. [*459] And, if the executors were made a party, the Court would scarcely think it sufficient for the executor alone to be a party, without the residuary legatees: *Loy v. Duckett*.^(a) In such circumstances, I can do no wrong in treating the case as one in which the executor has no such interest in the fund as makes him a necessary party for his own sake, or for the sake of any he might represent. Having satisfied myself upon these two points, I may, I think, treat the Consols as part of the residue unadministered, and subject to the same liability, upon the question of costs, as if the executor were a party.

If in the suit of 1805 the stocks were dealt with, my conclusion is altogether wrong. I understand from the counsel in the cause, that the parties are dissatisfied with my judgment on the main question; my judgment upon the question of costs may be reviewed with it.

(a) Cr. & Ph. 305.

1848.—Hunter v. Nockolds.

HUNTER v. NOCKOLDS.

1848: 8th and 29th June; 3rd July.

After a plea of outlawry of the plaintiff, the outlawry was reversed, and it was held that the plaintiff was entitled to an order of the Court for the issue of a new subpoena against the defendant, and that, upon service of such subpoena, and payment of 20s. costs, (as directed by Lord Clarendon's Order,) the defendant should answer the bill, and that the costs of the motion must be paid by the plaintiff.

SIR FRANCIS VINCENT, one of the defendants in this cause, pleaded to the bill the outlawry of the plaintiff.(a) The plaintiff afterwards procured the outlawry to be reversed.

[*460] Mr. *Southgate* moved, *ex parte*, that the plaintiff *might be at liberty to serve a new subpoena upon Sir Francis Vincent, upon payment to him of 20s. costs; and that he might be ordered to answer the bill within six week. He cited Lord Clarendon's Order,(b) and 1 Daniel's Chancery Practice, p. 51, Headlam's edition.

The VICE-CHANCELLOR said, that if the plaintiff could, after reversal of the outlawry, pass by the plea, and proceed, under Lord Clarendon's Order, to issue a new subpoena, without other notice to the defendant than service of the subpoena when it was issued, and payment of the 20s. costs, (upon which he expressed no opinion,) the plaintiff did not require the previous order of the Court for that purpose; but, if a previous order of the Court were necessary, notice must be given of the application for that order.

The plaintiff then gave notice of motion, that the plaintiff might be at liberty to serve a new subpoena on the defendant, on payment of 20s. costs; and that the defendant might be ordered

(a) See 2 Ph. 541; ante, p. 12, S. O.

(b) Beames' Orders, 175.

 1848.—*Hunter v. Nockold*.

to answer the bill within six weeks of the time of such service and payment.

June 29th.—The *Solicitor-General* and Mr. *Southgate*, in support of the motion.—No precedent for the order to be made in such a case had been found. No record could be found of what was afterwards done on the subject of the plea in *Waters v. Chambers*.(a) It would rather appear that the plaintiff *Waters* became bankrupt, and a supplemental bill was filed by his assignees. The plea of outlawry is a good plea only “so long as the outlawry remaineth in force.”(b) According to Lord *Clarendon’s Order; it was sufficient to serve a new sub- [*461] poena, and pay 20s. costs; and to the same effect was the Practical Register.(c) In *Daniel’s Practice*,(d) it was said, on the authority of Chief Baron *Gilbert*,(e) that a bill of revivor must be filed, as the suit had abated. Another reason there assigned for a bill of revivor was, that, as the plea and judgment were parts of the record, there would be an inconsistency in subsequent proceedings, without some entry on the record to show that the ground of the judgment had been removed; but that was scarcely a sufficient reason, for the orders of the Court were registered in the Report Office, whilst the bills, pleas, demurrers, and answers were filed in the Office of Records; therefore an answer would frequently follow in the Record Office a plea by the same defendant, for the order overruling the plea would be in the Report Office. The *Forum Romanum*, which was published in 1758, contained no mention of Lord Clarendon’s Orders, and was probably confined for the most part to those rules which were the same both in the Court of Chancery and in the Exchequer. They cited also Lord Redesdale’s *Treatise on Pleading*, p. 185, 8d edition.

(a) 1 Sim. & St. 225.

(b) Lord Clarendon’s Orders, 18th July, 1666, Beames’ ed. 175. See Beames on Pleas, p. 101, n. (2.)

(c) Page 327, Wyatt’s ed.

(d) Vol. 1, p. 51, Headlam’s ed.

(e) For. Rom. 53, 177.

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Mr. *Schomberg*, for the defendant Sir Francis Vincent, opposed the motion. He submitted that the view of the practice taken by Chief Baron Gilbert was consistent with Lord Clarendon's Order, for the bill of revivor might be necessary, as well as the subpoena to answer the original bill. It was also consistent with principle, for every plea must be either a plea in bar or a plea in abatement. Outlawry was a ground for a plea in abatement, and thence it followed that revivor was necessary.

[*462] *VICE-CHANCELLOR:—I have not been assisted by a reference to any previous order of the Court in a similar case. I think Lord Clarendon's Order applies to the present case. The only question is, how, after a plea of outlawry has been allowed, the cause is again to be set on foot,—whether the plaintiff is entitled, under Lord Clarendon's Order, to issue a subpoena, without application to the Court, or to obtain an order for a new subpoena, and that the defendant may answer the bill, upon the service of the new subpoena, and payment of the 20s. costs. The Order says, that a plea of outlawry, if it be in any suit for that duty touching which relief is sought by the bill, is insufficient according to the rule of law, and shall be disallowed of course, as put in for delay; and the plaintiff may, notwithstanding such plea, take out process to enforce the defendant to make a better answer, and pay five marks costs.”(a) This could not well be done as of course, or without a special order for the purpose.(b) It is suggested in some of the books of practice, that a bill of revivor is necessary in such a case; but I think that is not so, and that the plaintiff is entitled to the order which he asks. The plaintiff must pay the defendant the costs of the motion, such costs having been incurred in consequence of the outlawry.

(a) Lord Clarendon's Order, 18th July, 1666; Beames' Orders, 175.

(b) See *Gilb. For. Rom.* 54, as to pleas of outlawry insufficient in point of form.

1848.—Rowland v. Morgan.

*ROWLAND v. MORGAN.

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1848: 18th, 19th, 21st, 22nd, and 28th February; 17th April.

Bequest of plate, jewels, and other chattels by the Earl of Abergavenny to his son, Viscount Nevill, and his heirs, Earls of Abergavenny, "to be held as heirlooms," with a direction to the testator's executors to make an inventory of all such chattels and effects; and a subsequent bequest by a codicil, declaring, that, in addition to the articles and things he had in his will made heirlooms, certain other articles should be considered and taken to be heirlooms, and bequeathing the same to his executors "as heirlooms in" his "family," directing them to make an inventory thereof, and sign the same:—*Held*, that the gift of the chattels was not executory; that the same vested absolutely in the first taker, Viscount Nevill, who succeeded the testator in the earldom; and that, not having been disposed of by him in his lifetime, the same upon his death passed to his executors.

The addition in the codicil of the words "as heirlooms in my family," gives rise to no distinction in point of construction.

If the gift had been executory, inasmuch as there was the dignity, the family estate, and the purchased estate, and it was not certain, upon the language of the bequest, to which the testator would annex the chattels, the conclusion would have been the same—*Semble*.

THIS bill was filed by the executor of Henry, late Earl of Abergavenny, against the executors of John, the late Earl, who was the eldest son of Earl Henry, and also against William, the present Earl, the second son of Earl Henry, William Viscount Nevill, and Ralph Pelham Nevill, the sons of the present Earl, and Reginald Henry Nevill, son of George Henry Nevill, who was the brother of the testator Earl Henry; and the object of the suit was to determine which of the defendants were entitled to, or what interests they respectively had in, a valuable collection of plate, jewelry, and articles of furniture, apparel and ornament, which had belonged to Earl Henry, and were bequeathed by his will and second codicil,

The clause of the will of Earl Henry, disposing of the articles in question, was as follows:—"And I hereby give and bequeath unto my said son John, Lord Viscount Nevill, and to his heirs, Earls of Abergavenny, all my gold and silver plate and pictures, and all my books, lace, family pearl necklaces, silver boxes, and

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family robes, and all diamonds, miniatures, and gold and silver ornaments, to be held as heirlooms, except such things as I shall specifically bequeath by this my will. And I direct that my executors do make an inventory of all such chattels and effects."

[*464] *The second codicil was as follows:—"And I declare my will and mind to be, that, in addition to the articles and things I have in my will and codicils made heirlooms, all and singular the miniatures and pictures and silver fillagree, Indian articles, ornaments for tables, and foreign lace, and all other the articles contained in two green boxes tied with tape, and sealed with my seal, and which are numbered 1 and 2, and deposited in a drawer in my library, and also all the miniatures, seals, and all other the articles contained in a small cabinet in my gallery, shall be taken and considered to be heirlooms, and I hereby give and bequeath them to my executors as heirlooms in my family. And I hereby authorize and direct my executors to make an inventory of all and singular the articles hereby bequeathed, and sign the same, and I authorize them to open such boxes and cabinets for that purpose."

The dignity of Earl of Abergavenny is descendible to the heirs male of the body, and not to the heirs general. Eridge Castle and other manors in the county of Sussex, and elsewhere, had descended upon and become vested in the testator Earl Henry for an estate in tail male, under the provisions of a statute of Phillip and Mary, intituled, "An Act concerning the restitution of the heirs male of Sir Edward Nevill, Knight," whereby the estate tail therein, and the remainders and reversions expectant thereon, were made inalienable, and the ultimate reversion was limited to the Crown. The testator was also seised in fee of other real estates of large value, which he had acquired by purchase in his lifetime. The testator had two sons, John, then Viscount Nevill, afterwards the said Earl John, and William Nevill, now Earl of Abergavenny. He had also, at the time the will was made, two grandsons, sons of the said William Nevill,

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the defendants, William Viscount Nevill, and Ralph Pelham Nevill.

*The will was dated the 5th of March, 1839, and recited that the testator had only two children, namely his said eldest son, and his said younger son William, who had a large family; that the ancient family entailed estates had become so improved, that they produced in rental much more than when he came to the title; that he had also by care and economy been enabled to purchase and acquire estates of the value of 70,000*l.* and upwards; and that, as it was his intention to give all such estates to his eldest son John, to descend with the title, he considered he was bound to make a good and proper provision for his son William Nevill: and the testator thereby gave, devised, and bequeathed certain freehold messuages, farms, and lands, tithes and hereditaments, turnpike securities, navigation and canal shares, and all and singular other his freehold and copyhold messuages, lands, tenements, and hereditaments, with their several appurtenances, save and except certain of the said purchased lands and hereditaments, situate in Birling in Kent, unto his brother, the said George Henry Nevill, (since deceased,) and the plaintiff, Daniel Rowland, their heirs and assigns, to the use of the said John Lord Viscount Nevill and his assigns for his life, without impeachment of waste; remainder to the use of the said George Henry Nevill and the plaintiff, their heirs and assigns, during the life of the said John Lord Viscount Nevill, to support the remainders thereafter limited; and after the decease of the said John Lord Viscount Nevill, to the use of such person or persons as should or might be next entitled upon the decease of the same son to the said family settled estates in such order and course successively, and for such estate and estates, subject to, with, and under such powers, provisions, declarations, and agreements, as were expressed, limited, and contained, in and by the said act of Phillip and Mary, by which the *said [*465] family estates were settled and entailed, and subject also to all other powers, provisoes, and agreements, which were contained and then in force concerning any of his family estates, or which might be contained in any act of Parliament passed touch-

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ing and relating to the same estates. And after leasing and other powers followed the above bequest of the plate and property in question. The first codicil did not affect the subject in dispute; and the second codicil, dated in January, 1842, was in the words above stated.

The testator Earl Henry died; the title and settled estates descended upon his eldest son, Earl John, who died in April, 1845, unmarried, having by his will appointed Richard Morgan and Azariah Elswood his executors. The plate and articles, the subject of disposition in the above clauses of the will and second codicil, remained during the lifetime of Earl John in their places of deposit in Eridge Castle. On the death of Earl John, his executors were advised that the plate and articles in question were part of his personal estate. A claim to the same articles as being heirlooms was also made by William the present Earl, who inherited the dignity and estates upon the death of his elder brother.

Mr. *Anderdon* and Mr. *Fooks*, for the plaintiff.

Mr. *Bethell*, Mr. *Lee*, and Mr. *Goodeve*, for the defendant the Earl of Abergavenny; and Mr. *Romilly* and Mr. *Simpson*, for William Viscount Nevill, and his brother and cousin, argued that the clause in the will bequeathing the chattels in question, as explained and governed by the clause in the second codicil, was executory; that the direction was to annex the chattels,

by such settlement as the law would have permitted the [*467] *testator to make, to the parliamentary estates; and that

the Court would direct a settlement to be made, or construe the bequest by such a declaration as would give to the late Earl John a life estate only. The class of authorities cited in support of this proposition consisted of *Gower v. Grosvenor*(a) *Trafford v. Trafford*(b) *Countess of Lincoln v. Duke of Newcastle*(c) *Bankes v. Baroness Le Despencer*(d) 2 Rop. on Leg. 457, 3rd edit., *Attor-*

(a) Barn. Ch. R. 54; S. C., 5 Madd. 337.

(c) 12 Ves. 218, 238.

(b) 3 Atk. 347.

(d) 11 Sim. 508.

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ney-General v. *Duke of Marlborough*, (a) *Austen v. Taylor*, (b) *Blackburn v. Stables*, (c) *Jervoise v. Duke of Northumberland*, (d) *Clarke v. Earl of Ormonde*, (e) and *Vanderplank v. King*. (f) The cases opposed to this argument were distinguished. On the signification of the term "heirlooms," *loom* Sax., "limb" or "member"—2 Black Com. 427; and, as likened to monuments, or ensigns of honor, Co. Litt. 18, b., were cited.

Mr. Walker, Mr. Humphrey and Mr. Roundell Palmer, for the defendants Richard Morgan and Azariah Elswood, the executors of John, the late Earl, argued that there was nothing executory in the disposition of the property in dispute, and that the effect was to give an absolute interest to the late Earl, which passed to his executors. The principal authorities relied upon in support of this argument were *Foley v. Burnell*, (g) *Vaughn v. Burslem*, (h) *Duke of Bridgewater v. Egerton*, (i) *Carr v. Lord Errol*, (k) *Viscount Deerhurst v. Duke of *St. Alban's*, (l) *Mackworth* [*468] *v. Hinzman*, (m) *Lady Laura Tollemache v. Earl and Countess of Coventry*, (n) and *Rochfort v. Fitzmaurice*. (o)

April 17.—VICE-CHANCELLOR:—The question is, whether I am to read either the will and codicil, or both, as containing direct testamentary gifts, the construction of which alone I am to determine; or whether the will and codicil are to be considered as directory; and what, in that case, is the direction to be found in them, or either of them,—that is, (in the language of some of the cases,) whether the testator (intending to do a given thing) has taken upon himself to be his own conveyancer, or whether he has only told the Court what he desires to have done, and has required the Court to say what estates and interests will best give effect to his declared intention. A great number of cases were cited at

(a) 3 Madd. 498.

(b) 1 Eden, 361, 368. (c) 2 Ves. & B. 367.

(d) 1 Jac. & Walk. 559, 570, 574.

(e) Jac. 108.

(f) 3 Hare, 1.

(g) 1 Bro. C. C. 274; S. C., 4 Bro. P. C. 319.

(h) 3 Bro. C. C. 101.

(i) 2 Ves. 122; S. C., 1 Bro. C. C. 280, n.

(k) 14 Ves. 478.

(l) 5 Madd. 232.

(m) 2 Keen, 658.

(n) 2 Cl. & Fin. 611.

(o) 2 D. & W. 20.

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the hearing; but the cases which (as it appears to me) open all the law that can usefully be referred to, are *Gower v. Grosvenor*,^(a) *Foley v. Burnell*,^(b) *Vaughan v. Burslem*,^(c) *The Duke of Newcastle v. The Countess of Lincoln*,^(d) and *Carr v. Lord Errol*.^(e)

If I am to read the will and second codicil as each containing a direct gift, I cannot doubt that the claim of the executors of Earl John must succeed. A devise of real estate to A. and his

heirs, lords of the manor of Dale, gives A. a fee, because, [*469] by possibility, the estate *may endure for ever. And

if such a devise were accompanied with a bequest of specific chattels to A., to go as heirlooms, I cannot doubt that the absolute interest in such chattels would vest in A.; for, in order that a legatee of chattels may take an absolute interest in them, it is enough that they are given in terms which, in case of a devise of lands, would give an estate of inheritance. These observations appear to me to be decisive in favor of the claim of the executors of Earl John to the chattels given by the will, if I am to read the will as containing a simple and direct gift.

The construction of the second codicil (upon the same hypothesis) appears to me to be equally plain. The testator adds the chattels in the second codicil to those he has before given as heirlooms, and declares that those in the second codicil shall be heirlooms also. Stopping there, there is nothing to distinguish the gift in the codicil from that in the will. Then there is in addition a gift to the executors, "as heirlooms in his family." But that, as a matter of construction only, clearly makes no difference.

I will next suppose both the will and the codicil to be executory. The question then, as it appears to me, is, whether I am to apply to this case the reasoning of Lord Hardwicke in *Gower v. Grosvenor*, and in *Trafford v. Trafford*; or whether I am to apply to it the reasoning to be found in the other cases I have mentioned? Upon this question I do not find myself at liberty to hesitate. In *Foley v. Burnell*, and *Vaughan v. Burslem*, Lord

(a) Barn. Ch. R. 54; 5 Madd. 337. (b) 1 Bro. C. C. 274. (c) 3 Bro. C. C. 101.
(d) 3 Ves. 387; S. C., 12 Ves. 218. (e) 14 Ves. 478.

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Thurlow certainly overruled Lord Hardwicke's decision in *Gower v. Grosvenor* and *Trafford v. Trafford*. The former decision was affirmed by the Lords Commissioners and in the House of Lords.^(a) Lord Loughborough's *reasoning in giving [*470] that judgment as Lord Commissioner was, that in the case of a will he had no guide but the testator's words, and that he could not upon those words ascribe to the testator the detailed intentions, which, upon Lord Hardwicke's reasoning, he would be required to do. He says:—"It is sufficient, for the present purpose, that the intent is not clear. I cannot give it effect as an implied intent, for every implied intent must be free from doubt." He observes on the argument, that the testator has given a sufficient hint to the Court to carry on the limitation, and adverts to the series of directions which the Court must give in a case where there was nothing clear; adding, that "the Court cannot go further than the clear devise." Lord Eldon, in *The Countess of Lincoln v. The Duke of Newcastle*, although he expressed his approbation of Lord Hardwicke's reasoning, admitted that it had been overruled by the cases before Lord Thurlow, and considered those decisions as having settled the law. *Carr v. Lord Errol*, before Sir William Grant, followed the same rule. In that case the chattels were given to trustees, but Sir William Grant held that that circumstance made no difference. He took time to consider the case, and afterwards came to the same conclusion, considering the decision of Lord Thurlow binding upon him in that, as in other cases.

In this state of the authorities, I must consider *Gower v. Grosvenor* as overruled; and so it is, in fact, considered by text-writers.^(b) The case of *Trafford v. Trafford* is admitted to have gone too far.

If, then, I am to consider and treat the will and codicil as directory only, what are the limitations to which *I am to declare the chattels are subject. I may un- [*471] doubtedly say, that no tenant for life of the devised

(a) 4 Bro. P. C. 319.

(b) See 2 Jarm. on Wills, 507; 2 Rep. on Leg. 3rd ed.. 460.

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estates shall take more than a life estate in the chattels, and to that extent (without a doubt) I shall be doing what the testator intended, so far as guarding the chattels, for that time, against alienation. But can I say that, by so doing, I am executing an intention declared either in the will or codicil? Should I be doing more than devising a means of giving effect, in a way of my own, to that which Lord Loughborough calls "a mere hint" of the testator's intention, not defining or informing me what he really meant. In the cases referred to is to be found a direct reference to the limitations of the real estate; and Lord Thurlow would not go a step further, although the effect was, that the personal estate vested absolutely in the tenant in tail, and was thereby withdrawn from the settlement, whilst the real estate continued subject to it. Here there is no direct reference to the limitations of the real estate, except so far as making the chattels "heirlooms" may be said to have that effect. But the difficulty then arises, that it is uncertain whether the heirlooms, which by the supposition are to be annexed to something, are intended by the testator to be annexed to the dignity, to the parliamentary estates, or to the devised estates. Upon this hypothesis I cannot say the case is against Earl John.

The ground however, upon which I rest my judgment is, that nothing directory can fairly be found in the will or codicil, and that the testator has himself declared what interest he intended the legatees to take in the plate and collection of articles in question. No doubt, in taking this view of the case, I disappoint the real intention of the testator; for he meant the chattels to be inalienable as far as they could be made so: but he has [*472] *given them in such a way as precludes me from carrying his intention, in that respect, even partially into effect.

With regard to the question of costs, I am very reluctant to charge a party with costs, when he has acted bona fide, and I do not mean to suggest, that it has not been so in this case; but, as to that part of the suit in which the plaintiff has gone into evidence, and endeavored to establish a case as to an agreement, he must pay the costs of the suit. I cannot charge the estate

 1848.—*King v. Smith.* *

with those costs. The cestuis que trusts, the parties beneficially interested, do not affect to say they can stand on the alleged agreement.

The decree will be,—The defendant the Earl of Abergavenny and his sons, and the party ultimately interested, not claiming to be entitled to the plate and collection otherwise than by force of the will and second codicil of Earl Henry, the Court declares, that the executors of Earl John are entitled to the articles in question.

Affirmed by the Lord Chancellor.

**KING v. SMITH.*

[*473]

IN THE MATTER OF THE ACT 1 WILL. IV., CAP. 60.

1848: 1st August.

The costs of the petition and order under the statute 1 Will. 4, c. 60, for the re-conveyance of a mortgaged estate to the mortgagor, or his representatives, upon payment of the mortgage-money, are to be borne by the mortgagor or his estate, although such proceedings were rendered necessary by the circumstance that the mortgagee had devised the legal estate in the mortgaged premises to three trustees, one of whom could not be found.

W. SMITH conveyed real estates, by way of mortgage in fee, to Reid, in 1834. Reid died in 1835, having devised the mortgaged estate to King, Jones, and Sowerby his executors, upon trust to reconvey the same to the parties entitled upon payment of the mortgage money. W. Smith died in 1837, having by his will given all his real and personal estate to S. Smith. S. Smith obtained letters of administration with the will annexed.^(a) A suit was instituted to administer the estate of Reid, in which a

(a) A question between the representatives of the mortgagee and the representatives of the mortgagor, in this case, arose on another point. See *King v. Smith*, 2 Hare, 239.

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receiver was appointed, and in March, 1848, S. Smith, the representative of the mortgagor, paid the amount of the mortgage debt and interest to such receiver. Jones, one of the executors and devisee in trust of Reid, could not be found to reconvey the estate; and upon the petition of King and Sowerby, it was referred to the Master in the usual form to inquire whether Jones was a trustee of the mortgaged premises within the statute. The Master found, that, in July, 1848, Jones became embarrassed in his affairs, and absented himself from his home; and that although diligent inquiries had been made after him, no information respecting him had since that time been obtained, and he found that it was uncertain whether Jones was living or dead, or whether he was or not out of the jurisdiction, but there was reason to believe that he had left England. And the Master found that Jones, if living, was a trustee for the mort-
 [*474] gaged premises for S. Smith, within the meaning of the statutes in that behalf.

King and Sowerby presented their petition for confirmation of the report, and for a reference to the Master to settle a proper reconveyance to S. Smith; and that upon payment of the costs of the mortgagee and his representatives, the petitioners and the person appointed by the Master to convey, instead of Jones, might execute the reconveyance.

The *Solicitor-General*, for the petition.

Mr. *Walford*, for S. Smith, opposed the order as to costs; and distinguished the cases where applications to the Court or proceedings out of the ordinary course were occasioned by the operation of law, or by inevitable circumstances incident to the security, as *Ex parte Ommaney*, (a) and *Burden v. Oldaker*, (b) cases where the additional expenses were caused by some extraordinary event, which might be more especially described as the act of God, such as lunacy: *In re Townsend*, (c) *Ex parte Rich-*

(a) 10 Sim. 298.

(b) 1 Coll. 105.

(c) 2 Ph. 348.

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ards,(a) and *In re Marrow*;(b) and cases where such increased expenses were occasioned by some negligent, capricious, or unnecessary act of the mortgagee, as in *Midland Counties Railway Company v. Westcomb*;(c) and *Copper v. Terrington*;(d) in which latter classes the costs were considered not to be chargeable on the mortgagor. The present case was one falling clearly within the last of the three classes, for the petitions and orders under the statute had been rendered *necessary from the [475] unusual and unnecessary act of the mortgagee in vesting the legal estate, by his devise, in three trustees, whereby the chances of this very difficulty had been increased, and the difficulty had occurred.

VICE-CHANCELLOR:—I have no doubt of the order which should be made as to these costs. I do not presume to question the decision in another branch of the Court. If the title to mortgaged property be mixed up, by the mortgagee, with the title to other property, and it becomes necessary to extricate the one from the other, it may be right, that, in such a case, the additional costs should be borne by the general estate of the mortgagee. Prima facie, the rule must be admitted, that the mortgagor must bear the costs of obtaining a reconveyance of his property. The principle adopted by Sir John Leach (which certainly the Lord Chancellor did not disapprove in *Townsend's case*(e) was, that where a party mortgages his estate, it is incident to the right of the mortgagee to deal with the property for his own benefit; and, therefore, to deal with it in the ordinary way as other property. The question came before the Lord Chancellor in lunacy where the mortgagor had become bankrupt, and the mortgagee a lunatic,—whether the estate of the lunatic, or of the bankrupt, was to pay the costs of procuring a conveyance of the estate, and the Lord Chancellor thought that the mortgagor ought to pay the costs,(f) disapproving of the case of *Ex*

(a) 1 J. & W. 264.

(b) 1 Cr. & Ph. 142.

(c) 2 Railw. Cas. 211.

(d) 1 Coll. 103.

(e) 2 Ph. 348.

(f) *In re Marrow*, 1 Cr. & Ph. 142.

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parte Richards.(a) In *Townsend's case* the question came again before him, and, still disapproving of *Ex parte Richards*, he thought that, as that case had been twice followed, [*476] *the practice was settled. If the case rested there, the distinction between the case now before the Court and that case would have deserved much consideration. In *Ex parte Richards* it was not denied, that, in the case of a mortgagee leaving an infant heir, where an application to the Court is made, the costs of completing the conveyance are borne by the mortgagor. Therefore, there are two classes of cases opposed to each other, in one of which, (that of lunacy,) the opinion of the Lord Chancellor is, that a certain practice is established; and in the other class of cases, a different rule is pursued, which is in accordance with what the Lord Chancellor thinks is right, and with what was always considered to be the rule of the Court as to costs of the mortgagor in getting back his mortgaged estate. There is, then, a third class of cases where, as in this case, a mortgagee has devised his legal estate to trustees, instead of allowing it to descend to his infant heir. The first observation is, that the mortgagee has a right to do the best he can to protect his estate in case of his death. Is he bound to incur the peril of allowing his estate to descend to his heir-at-law, who may possibly be a person not to be trusted; or, is he not to be allowed, for the protection of his own estate, to place the mortgage, as well as his other property, in the hands of trustees? Can it upon any principle be said, that, if he devises his estate, he must be deprived of the effect of the general rule which entitles a mortgagee, on having his debt paid off, to be paid also his costs. I think his estate ought not to be deprived of his costs in such a case; and being clear as to the general principle, the representatives of the mortgagee must, in the present case, have their costs of the proceedings before they execute the reconveyance.

(a) 1 J. & W. 264.

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*ATTORNEY-GENERAL v. WARD.

[*477]

1848: 21st, 24th, 25th, 26th, and 31st January.

Upon an information for the appointment of new trustees of a Dissenters' meeting-house, on the ground that the parties in possession had excluded persons who, according to the trusts, were entitled to the use of the premises, and had admitted others to the use of the same who were not entitled thereto: the Court made a decree for the appointment of new trustees, notwithstanding the deed declaring the trust was not enrolled according to the provisions of the Mortmain Act, (9 Geo 2, c. 36,) and notwithstanding the defendants who had (permissively) the possession and use of the premises objected, at the hearing, that the deed was void under the statute; the defendant who had the legal estate admitting the trust, and submitting to act as the Court should direct.[1]

[1] In the State of New York it has been held, that the Court of Chancery had no power to remove an officer of a religious corporation, or to disfranchise a member thereof, or to interfere with, or control directly or indirectly, the election of its officers, or to declare their election void. Nor had the Court power to disfranchise a member by declaring that he did not possess the necessary qualifications. That it might in many cases, and by virtue of its general jurisdiction over them, enforce trusts; and when such a corporation acted merely as trustee, and abused the trust, it could be divested of it; but that the Court could not take from such a corporation its property, nor the management of it from the trustees duly elected, nor divest the latter thereof, nor take it out of their possession. The Court might interfere to a certain extent on account of a misapplication of the funds of the corporation. The trustees might be restrained from wasting the property of the society, or from such management of it as unreasonably and unconscientiously deprived the society or some part of it of the enjoyment thereof. The Court might restrain the trustees from applying such property to the promotion of tenets clearly opposed and adverse to the fundamental principles of the faith and doctrines professed by the church or society at the time the corporation acquired the property. But that the exercise of this jurisdiction should generally be restrictive and not mandatory, the Court might, upon the application of a portion of the corporation in such a society, restrain the trustees from applying the temporalities of the corporation to the support of a parson or minister who had been deposed from the ministry by the proper ecclesiastical tribunal. *Robertson v. Bullion*, 9 Barb. S. C. R. 64. See *Attorney-general v. Shore*, 7 Sim. 309, n.; *Shore v. Wilson*, 9 Clark & Fin. P. R. 355; *Porter v. Clark*, 2 Sim. 520; *Milligan v. Mitchell*, 1 Myl. & Keen. 446; 3 Myl. & Craig, 72; *Foley v. Wenter*, 2 Jac. & Walk. 245; *Attorney-general v. Drummond*, 1 Conn. & Law, 210; *The Presbyterian Congregation v. Johnston*, 1 Watts. & Sergt. 9; *The Baptist Church v. Witherell*, 3 Paige's Ch. R. 296; *The Reformed Protestant Dutch Church v. Mott*, 1 Paige's Ch. R. 77; *Kniskern v. The Lutheran Church*, 1 Sandf. Ch. R. 439; *Bowden v. McLeod*, 1 Edw. Ch. R. 588; *The People v. Steele*, 2 Barb. S. C. R. 397.

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The Court will make a decree for the appointment of new trustees of lands, for a charitable use, although the deed originally declaring the use be not enrolled under the Mortmain Act, if the trustees in whom the legal estate is vested admit the trust, and do not object that the deed is void under the statute, but submit to act under the direction of the Court.

Whether a deed vesting lands in trustees for a charitable use, not enrolled under the stat. 9 Geo. 2, c. 36, and therefore within that act "null and void," is admissible in evidence, for the purpose of showing upon what trusts the lands are held, the party having the legal estate admitting that he is a trustee, and claiming no beneficial interest—*Quere*.

Proof of twenty-five years usage of a Dissenters' meeting-house for worship by persons of a certain religious society, is not, under the Stat. 7 & 8 Vict. c. 45, conclusive evidence that the trusts of the premises are for the benefit of that society, where such trusts are declared upon the face of the deed by which the premises are dedicated to the charitable use, although such deed, not being enrolled, is "to all intents and purposes null and void," under the Mortmain Act.

THIS information was filed in 1839, at the relation of Ann Meek, and several other persons, against the defendants, Ward, Elliott, Young, Maddison, Potter, Rutherford, Southwell, Wilson, Phillips, Robson, and Scott. The information stated, that, in August, 1831, the Marquis of Londonderry demised to the defendant Ward, a plot of ground at Shiney-row, in the parish of Houghton-le-Spring, with the meeting-house and two school-rooms then lately built thereupon, for the term of twenty-one years, at a yearly rent of 2s. 6d.; that the expenses of the buildings were defrayed by the voluntary subscriptions of persons of the society or denomination of Wesleyan Methodists assembling for worship and other religious purposes in that neighborhood; and Ward was a trustee for that society.

The information then stated a deed, dated in December, 1831, whereby Ward assigned the premises to the other ten defendants and another person since deceased, for the residue of the term, upon trust for the Wesleyan Methodists, substantially the same as those admitted in the answer of the defendant Ward to be the trusts declared by the original deed. The same deed of assignment also empowered the trustees to collect the pew-rents, and other rents and profits of the premises, and apply
 [*478] the same, first, in payment of the interest of *moneys borrowed, or to be borrowed, for improving or repairing

the buildings; secondly, in payment of the taxes and other outgoings; thirdly, in payment or reduction of the principal debt or debts upon the property; and lastly, as to the surplus, as the trustees, the superintendent preacher, the steward of the society, and the class-leaders should determine: and the deed empowered the trustees to raise the money by mortgage of the property for the repair, maintenance, or improvement of the buildings.

The information alleged that the buildings were, shortly before the date of the lease, repaired and enlarged at an expense of 210*l*, which was raised by a loan from the defendant Elliott and one Taylor; and that the other trustees gave their joint and several promissory notes to Elliott, and also to Taylor, for the sums they respectively advanced.

The information stated some particulars as to the discipline and rules of membership of the Wesleyan Methodist Society, under a certain deed of 1784; and that in 1836, many members of the society, and in particular many of those who used to assemble at the meeting-house at Shiny-row, seceded; and that all the defendants the trustees appointed by the assignment of December, 1831, except Robson, (Rutherford having previously left the society,) were among such seceders; and such seceders and others in the neighborhood were permitted by the trustees (of whom the majority were seceders) to have the use of the meeting-house on the Sunday morning, and the persons who remained members of the society were allowed the use of it in the afternoon and evening.

The information alleged, that the defendants the *trustees who were seceders, pretending that the meet- [*479] ing-house was originally destined as a place of worship for the inhabitants of Shiny-row and the neighborhood, and ought to be used for that purpose, whether such inhabitants were Wesleyan Methodists or not, formed a scheme to carry their views into effect; and in prosecution thereof they executed a deed, dated the 2nd of July, 1836, reciting that the society of Wesleyan Methodists at Shiny-row had, by reason of such secession, become so reduced as to be nearly dissolved, and that doubts had arisen whether the majority of the congregation were not by

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reason of such trusts excluded from the use of the premises, whereby the intentions of the parties to the lease would be frustrated; and thereby, in order to determine such doubts and to carry their object and intention into effect, they, the parties of the first part, surrendered the said premises to Ward for the residue of the term, to the intent that he might hold the same in such manner as if the assignment of December, 1831, had not been made.

The information alleged that Elliott was in receipt of the rents and profits derived from the meeting-house, which he retained in respect of what was due to him on the promissory note; and that he, and the other seceding defendants, by the authority and permission of Ward, would not suffer the preachers appointed by the Wesleyan Conference, according to the constitution of the society, to have the use or occupation of the meeting-house.

The information prayed that new trustees of the premises might be appointed, that an account might be taken of what was due to the mortgagees, and that, (if necessary,) upon a proper indemnity, Ward and all other necessary parties might be [*480] decreed to assign the meeting-house*and premises to such new trustees; that the defendants might be restrained from permitting any persons not appointed by the Wesleyan Conference to use the meeting-house for preaching or otherwise, and from interrupting the persons duly so appointed, and other persons being Wesleyan Methodists, in using the same.

The defendant Ward, by his answer, stated that the site of the meeting-house and schools, had been originally granted in 1805, by Sir Henry Vane Tempest, for the benefit of his colliers and their children, and that the building was erected principally by the subscriptions and through the exertions of one Allan; that Sir William Vane Tempest demised the premises to the defendant Ward; and that Allan having been unable to make up his mind as to the trusts upon which the premises should be settled, the defendant Ward, in order to exclude any imputation of neglect on his part, prepared an indenture, which was dated in November, 1806, whereby the premises were assigned to certain persons therein named, upon trust to permit and suffer such per-

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son and persons as should be appointed and sent by the yearly conference of people called Methodists, as described and established in and by a deed-poll of John Wesley, late of the City-road, London, clerk, deceased, under his hand and seal, bearing date the 28th of February, 1784, and enrolled in the High Court of Chancery, to officiate therein as ministers or expounders of the Word of God; and in case no such person should be appointed by the said general yearly conference as aforesaid, upon trust to permit and suffer such person or persons to officiate therein as such ministers and expounders as should from time to time be nominated and appointed by the said trustees, or the survivor of them, or the trustees for the time being of the same premises, or the major part thereof, provided that such person or persons so to be respectively *appointed as aforesaid should [*481] preach or teach no doctrine contrary to the New Testament, and to what was contained in the notes and annotations thereon, and the several volumes of sermons written and published by the said John Wesley. The defendants stated, that, the original lease having expired, the new lease of August, 1831, stated in the information, was granted. The defendant stated, that he believed the original design of the parties had been for the benefit of the colliers and their children generally, without reference to sect or persuasion. He admitted that he was a trustee, and claimed no beneficial interest in the premises.

The defendants Young, Maddison, Potter, and others, by their answers, said that the meeting-house and schools were built in 1804 or 1805 by the voluntary subscriptions of workmen employed in the collieries and other persons in the neighborhood, and that the lease having expired, a new lease was granted to Ward, in 1831, as a trustee; and they believed that the grant was made by the Marquis for the religious instruction of the workmen and their children, without reference to sect or party; that the defendants, after the secession, had determined to resign their trust to the defendant Ward, from whom they received it. They admitted the use of the meeting-house by the seceders, as stated in the information. The defendant Elliot claimed to have

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a charge upon the premises for the moneys which he had advanced.

Mr. *Wood* and Mr. *Lloyd*, in support of the information, read the statements as to the trust from the answer of Ward, and tendered, amongst other evidence, the deeds of November, 1806, and December, 1831, showing the trusts thereby declared of the premises.

[*482] Mr. *Romilly*, for the defendants Young and others objected to the admission of those deeds as evidence, on the ground that they had not been enrolled, under the Mortmain Act, 9 Geo. 2, c. 36.(a)

The VICE-CHANCELLOR reserved the objection, observing that the other evidence in the cause might render the decision of the point immaterial.

Mr. *Rolt* and Mr. *Elderton*, for the defendant Ward, submitted to act as the Court should direct.

Mr. *Romilly* and Mr. *Glasse*, for the defendants Young and others, relied on the statute 9 Geo. 2 c. 36, s. 3, whereby gifts to charitable uses, not enrolled within six months after execution, according to the provisions of that act, are declared to be "absolutely and to all intents and purposes null and void:" *Doe* d. *Wellard* v. *Hawthorn*,(b) *Doe* d. *Preece* v. *Howells*.(c) The act had its foundation in public policy. The principle of policy was adverted to by Lord Hardwicke in his judgment in *Att. Gen.* v. *Graves*,(d) in which he notices the preamble of the statute: "Whereas gifts, &c. in mortmain are restrained by Magna Charta and divers other wholesome laws," &c. Although, therefore, the parties had not taken the objection by their answers, they were not excluded from raising it at the hearing. The in-

(a) See 9 Ves. 490.

(b) 2 B. & A. 96.

(c) 2 B. & Ad. 744.

(d) Amb. 157.

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formation must be dismissed with costs, inasmuch as the only evidence in support of it consisted of deeds which the Court was bound to treat as wholly void.—They cited *Att.-Gen. v. Gardner*.^(a)

Mr. *Wright*, for the defendant Elliot relied on the same defence.

*Mr. *Wood*, in reply, contended, first, that the objection, not having been taken by the answer, could not be raised at the hearing: *Dunn v. Calcraft*.^(b) In *Att. Gen. v. Gardner* the want of the enrolment was alleged and proved. Secondly, that the evidence of what was done from 1806 to 1831, showed a usage of twenty-five years, which was enough, under the stat. 7 & 8 Vict. c. 45, to establish the present trust, without evidence of the original trust.

[The VICE-CHANCELLOR said that it appeared to him that the statute had no application to the present case.]

Thirdly, Ward, in whom the legal estate is vested, did not raise the objection, and it was against him only that any relief was asked in respect of the property. As against the other parties, the only question was the costs of the suit; and the absence of enrolment was no ground to relieve them from the liability to costs. It was rather their duty, when they were appointed trustees to have seen that the deed was duly enrolled.

VICE-CHANCELLOR:—The premises in question have been held, subject to a trust for the use of a religious society, ever since the year 1805. Many of the members of that society have lately seceded, and ceased to belong to the society. The present information prays that the property may be assigned or conveyed to new trustees. The defendants who have seceded from the society.

(a) Before the Vice-Chancellor Knight Bruce, in April, 1846.

(b) 2 Sim & Sta. 56.

contend that the information ought to be dismissed, on the ground that the deeds declaring the trust have not been enrolled under the Mortmain Act. If this objection had arisen between [*484] the *lessor of the premises and Ward, or between the Attorney-General and the lessor, or the Attorney-General and Ward, and it had been properly pleaded and put in issue, it might perhaps have been sustained; but the objection is in this case made by parties who at one time held the property upon the trusts stated by the information, and, having now no legal title, yet claim the right of using the property for purposes which are certainly different from those to which it was originally declared to be applicable. Having regard to the position and conduct of these parties, I do not think they can be heard to sustain this objection.

The defendant Ward is in this case the trustee of the legal estate, and he admits that he holds the property upon trusts which are declared by certain deeds, and submits to act as the Court shall direct. The trustee does not himself claim the property: he is willing that the trusts which he admits to exist should be executed under the direction of the Court. I am not aware of any ground of public policy upon which the Court is bound to take the objection of the absence of an enrolment, which the party legally entitled to the property does not insist upon. Is the Court to hold, that, because the deed of trust has not been enrolled, Ward, in whom the property is vested at law, is to retain it, Ward himself not claiming any such right, but, on the contrary, asking by his answer for the direction of the Court to relieve him from the trust? I see no ground for such a conclusion. I shall refer it to the Master to appoint new trustees of the premises; and the defendant Ward, upon being paid his costs, must assign to such new trustees.

In deciding the question of costs as to the other parties, [*485] I shall exclude altogether the claims of lien made *upon the property. The suit has not in any degree been occasioned by those claims, nor the costs enhanced by them. I shall exclude also the supposition that Elliott or Young, and those who have joined in defence with him, can have their costs. They

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accepted a given trust, and their conduct, both out of court and in court, has been decidedly inimical to the trust they accepted; and the re-assignment to Ward was (to say the least) an irregularity. Their proper course in 1836 would have been to raise no question as to the nature or validity of the trust they had accepted, and if (by arrangement) they could not get discharged from the trust, to have applied to this court, in an amicable suit, for a substitution of other trustees in their stead. If that course had been taken, much of the costs of this suit might have been saved; and I will not give them their costs. I think it would be severe to charge them with any costs but their own.

If the suit had been brought before the re-assignment to Ward, I doubt whether, regard being had to the probable intention of the lessors, and the declaration of trust by Ward, I should have given costs against them for seeking to be discharged. On the other hand, if they had remained trustees, and taken advantage of their position to prevent the trusts they had undertaken to perform from being executed, it is probable they would have been charged with the costs of the suit; but having done that which was intended to be a retiring, and that act not having been complained of for three years, and the suit not being brought to a hearing until nearly nine years from its institution, I will not, upon the question of costs, treat the acts done by them since 1836 as the acts of trustees, although they have not been regularly discharged.

1848.—Ford v. Ford.

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*FORD v. FORD.

1848: 16th, 16th, and 21st March; and 10th April.

A testator entitled to a copyhold estate in remainder expectant upon the determination of the life estate of his wife in the same premises, by his will gave the income of all his property, wherever situate, or of whatsoever kind, to his wife, for her life; and, at her decease he gave all the property then left by him, and of which she was to have the income for her life, to his children; and on his wife's death, or second marriage, he directed his trustees to receive the rents and dividends arising from the estate and effects he should die possessed of, and to apply the same in the maintenance of his children until the youngest should attain twenty-one:—*Held*, that the interest of the testator in remainder in the copyhold estate passed by his will.

The tendency of modern decisions is to read the different clauses of the same will referentially to each other, unless they are clearly independent.

IN March, 1835, James Mortimer, and Ann the wife of Isaac Ford, were admitted tenants of certain copyhold premises at Islington and Holloway, held of the manor of Clerkenwell, and limited to them, equally to be divided between them as tenants in common, and the heirs of their respective bodies lawfully issuing, with cross-remainders between them in tail, with remainders over. At the same Court, James Mortimer and Isaac Ford, and Ann his wife, in order to bar their said estates tail, surrendered the premises, as to one undivided moiety, to the use of James Mortimer, his heirs and assigns; and, as to the other undivided moiety, to such uses as Isaac Ford and Ann his wife should by deed jointly appoint; and, in default of such appointment, to the use of Ann for her life, with remainder to the use of Isaac Ford, his heirs and assigns. And at the same Court Ann was admitted tenant of the undivided moiety for her life, subject to such joint power of appointment.

Isaac Ford made his will on the 3rd of March, 1836, and died the same day, leaving Ann, his widow, surviving. The testator was entitled to the reversion of the moiety of the copyholds at Islington and Holloway under the above limitation, and also to a considerable leasehold estate. He had no freehold estate. Ann, the widow, received the rents and profits of the moiety of

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the copyhold estate until her death. The principal question in the cause was whether the copyhold estate passed by the will?

The will of Isaac Ford, after directing that his executors should collect and get in all rents, and such debts and moneys as might be owing to him at his decease, out of which *to discharge his just debts and funeral and testamentary [*487] expenses proceeded: "and the remainder to place at interest; and the interest arising therefrom, and all other income arising from my property, wherever situate or of whatever kind soever, I give to my dear wife, Ann Ford for the term of her natural life, unless she should marry again. In that case she shall have nothing more to do with the property I hereby bequeath, but in lieu thereof, shall receive an annuity of £50 a year, by quarterly payments, while she lives, to be in bar of all dower or thirds she might otherwise be entitled to out of my estates and effects, and at her decease the said annuity to fall into the general amount," for the benefit of his children thereafter named. "And at the decease of my said wife, I give all the property now left by me, of which she is to have the income during her life as before mentioned, to my children, Samuel Isaac Ford, Ann Ford, Richard Ford, James Ford, Mary Frances Ford, and William Ford, or such of them as may be living at my decease, together with every child born of the said Ann Ford within nine months afterwards, share and share alike, after the youngest child shall attain the age of twenty-one years; but it is my desire that the share of either of my daughters shall not be subject to the debts or control of any husband. And if either of my children die before the youngest attains the age of twenty-one years without issue, then and in that case his or her share shall fall into the gross amount, to be divided among the survivors. And, in the event of my wife dying or marrying again, I direct my other trustees and executors to receive the rents and dividends arising from the estate and effects I shall die possessed of, and to pay and apply the same in the maintenance, education, and bringing up of all my children, until the youngest of them attains the age of twenty-one years." The testator appoint-

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[*488] ed *Ann his wife, and Samuel Isaac Ford his son, and another, trustees and executors of his will.

The *Solicitor-General*, Mr. *Humphry*, and Mr. *Lewin*, for the defendant Samuel Isaac Ford, the heir-at-law of the testator, contended, that no more was given to the children in remainder than the testator had expressly devised to the widow for life; for the words of the will were express, that the testator gave to the children the property "now left by me, of which" my wife "is to have the income during her life." The words "now left by me" could only mean the property before devised by him to his wife. The question then was, what was comprised in the gift to the wife? Could it be contended that the reversion of the property, of which the widow was already tenant for life by another title, was included in it? The will gave to the widow a life estate, but if she married the life estate was to be cut down to an annuity. How could such a limitation apply to a property which would not fall into possession until the death of the wife? If it were said that the wife might commit a forfeiture, the answer was, that the lord of the manor, and not the remainderman, would have the benefit of that forfeiture. If it were suggested that the wife might surrender to the husband, how could the Court construe the will by reference to an event which had not occurred at the date of the will, and which it did not appear the testator had contemplated, particularly as the will was made before the late act, and at a time when all devises were specific? If the lands in question were included at all, not the reversion only, but the fee in possession, must be deemed to be comprised, and then the wife, the tenant for life by her own title, [*489] *must be put to her election; but it was a clear rule that no person could be put to his election by force of a general expression. The Court always adopted the alternative of excluding the estate from the devise. Upon the whole will, it was an established rule of construction, that, where the limitations were inconsistent with the nature of the property, the lands did not pass. And here the limitation to the wife was inconsistent with the nature of the reversion, which could only

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come into possession on the death of the wife. The testator had expressly said, that no more should go to the children than he had given to the widow. The fact, that the testator had leaseholds, explained the reference to rents which occurred in the will. The words "estate" and "property" were not sufficient, looking to the context, to carry a reversionary fee. The testator directed his "executors" to get in his rents, (which having accrued at his death were personal estate,) and all moneys owing to him, and to invest and pay the produce, and the other income of his "property;" so that this was equivalent to a gift of the testator's accrued rents and moneys, and his other property; in which case, property, being coupled only with articles of personal estate, would be construed to mean personal property only. There was not a single expression throughout the will showing that the testator was dealing with anything more than his personal estate, including the leaseholds. As to the expression "dower and thirds," the testator, who had no legal knowledge, meant only the widow's thirds. The word "dower" could have no meaning, for at the time of the will there was no estate of which the widow was dowable. The only real estate was the copyhold reversion in question, of which the law gave no dower or free-bench: *Strong v. Teatt*, (a) *Goodtitle d. Daniel v. Miles*, (b) *Welby v. Welby*, (c) *Roe d. James v. Avis*, (d) [*490] *Church v. Mundy*, (e) *Saumarez v. Saumarez*, (f) *Doe d. Earl and Countess of Cholmondeley v. Weatherby* (g) *Pocock v. Bishop of Lincoln*. (h)

VICE-CHANCELLOR:—The question is, whether the remainder in the copyholds expectant upon the death of the testator's wife was included in the testamentary gift upon which the question in this cause arises? It is admitted that the testator had leaseholds and general personal estate, besides the remainder in the copyholds, and that the absolute interest in remainder, after the

(a) 2 Burr. 912.

(b) 6 East, 494.

(c) 2 V. & B. 187.

(d) 4 T. R. 615.

(e) 15 Ves. 396, 403.

(f) 4 Myl. & Cr. 331.

(g) 11 East, 322.

(h) 3 Bro. & Bing. 27.

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wife's death, was given to the children in such property of the testator as was included in the first devise in his will. It is also admitted, or, if not, I must decide, that the words of the will, simpliciter, which at the beginning of the will describe the subject of the gift, include the remainder in the copyholds.

The rules of construction, by which I profess to be guided, are simple. The first question is, do the words of the will, according to their natural and legal meaning, include the remainder in the copyholds. If they do include it, I am bound to give them that effect, unless from the context it appears, by "declaration plain", (a) that the words were used in a different sense, or unless the extrinsic circumstances exclude the usual and [*491] legal meaning of the words. This rule, which has sometimes been lost sight of by the ablest judges, (*Doe v. Ains*, (b) *Church v. Mundy*, (c) is clearly laid down in the older, and also in the most modern authorities, of which numerous instances are to be found in the late reports in the Court of Exchequer. One of the judges of that Court appears rarely to pass by an opportunity of enforcing the necessity of adhering to it. If the wife of the testator had not been the tenant for life in the copyholds, but such life estate had been in a stranger, or if the testator had had no other property, (*Church v. Mundy*,) the gift at the beginning of the will would, without dispute, have included the remainder in the copyholds. It would have included all the testator was entitled to at his death.

I have already stated my opinion as to the effect of the first description the will contains of the subject the testator is dealing with. Is there anything in the context, or in any extrinsic circumstance, to narrow the effect of the words?

In three parts of his will the testator uses different forms of expression, by which to describe the subject he is in each case dealing with. First, he speaks of "the interest therefrom and all other income arising from my property, wherever situate, or of what kind soever;" then, at the decease of his wife, he says, "I give all the property now left by me, of which she is to have the

(a) *Church v. Mundy*, 15 Ves. 406.

(b) 4 T. R. 605.

(c) 15 Ves. 396.

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income during her life, as before mentioned." And, afterwards, in the event of the death or second marriage of his wife, he directs his other trustees to receive "the rents and dividends arising from the estate and effects I shall die possessed of."

*Upon the first I have already expressed my opinion, [*492] that (standing alone) it includes the remainder in copyholds. Now, omitting for the present the second gift, unless the third be supposed to include something more than the first, we have an exposition by the testator himself of what he supposed he had done by the first, that he had given "all the estate and effects he should die possessed of;" and this gift, it will be observed, supposes the wife dead, in which case the difficulty suggested in argument will not arise. But how can I suppose the testator intended, in this part of his will, to give to his children, during their minorities, after the marriage or death of his wife, something more than he had given them before. Surely, if that had been intended, the testator would have expressly said so. He was providing for an event not before provided for, as the minority of his children after the marriage or death of his widow; and I cannot give to it an effect more extensive than the provision which was made before. The proposition, that the children took no interest in the copyholds, except during their minorities, which was urged upon me, and which indeed is included in the proposition, that the third gift comprehends more than the first, is inadmissible in this case. The tendency of modern decisions (and good sense requires it) is to read the different clauses in the will referentially to each other, unless they are clearly independent.

Then, does the introduction of the second description (which up to this point I have disregarded) make any difference. Upon the face of this will alone it clearly does not; and upon the face of the will alone I must read it as a devise of all the estate and effects of which the testator should die possessed.

The only question then which remains, is, whether *the fact that the wife was tenant for life of the copyholds, independently of the will, is sufficient to show [*493] that the remainder in the copyholds was not given to the child-

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ren, only because the wife would take nothing under that particular gift.

In the absence of the clearest authority, I should have great difficulty in coming to such a conclusion. The argument must be carried to this length—that if, in the settlement of property by will under a general description, (the sufficiency of which to pass all the testator had at his death is undisputed,) the property is limited to twenty persons in succession, the generality of the description must be restrained, and part of the property excluded, if any one of the persons to whom the property is limited had a previous interest in it co-extensive with that given by the will. The interest of the children supplies enough for the will to operate upon; and in such circumstances I cannot, without authority, doubt what in this case is the meaning of the testator's words. There is no room for argument upon the language of the will, except upon the words "as before mentioned," in the second gift; but those are mere words of reference, and are insufficient to cut down the meaning of the earlier description, explained as it is in the clearest manner by the last gift.

[His Honor desired the counsel for the plaintiffs to confine themselves to that part of the argument for the heir-at-law which was founded upon the cases of *Strong v. Teatt*,^(a) *Goodtitle v. Miles*,^(b) and *Welby v. Welby*,^(c) as being authorities, in specie, binding the Court to a construction which would exclude the interest of the testator in the copyholds.]

[*494] Mr. *Swanston* and Mr. *Wilcock* for the plaintiffs, and Mr. *Malins* for defendants in the same interest, commented on the special circumstances of the cases referred to, and cited also *Doe d. Moreton v. Fosssick*,^(d) *Attorney-General v. Vigor*,^(e) and *Anon.* 2 Ventr. 363, cited *Fearne Conting. Rem.* 244.

VICE-CHANCELLOR :—It appears to me that the circumstances relied upon by Lord Mansfield, in *Strong v. Teatt*, were so many,

(a) 2 Burr. 912.

(b) 6 East, 494.

(c) 2 Ves. & B. 187.

(d) 1 B. & Ad. 186.

(e) 8 Ves. 256.

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and his reasons so special, that it cannot be considered as furnishing any abstract rule, opposed to the general rule of construction which I have referred to. Still less is it an authority binding upon me in the present case, in which one simple fact alone is offered as sufficient to overpower the plain and settled meaning of the testator's words. In *Goodtitle v. Miles*, expressions were found in the will which are wanting here. The devise in that case was of lands, "not settled in jointure upon my wife." Expressions like those have been sometimes considered by judges of high authority as equivocal and flexible, and as being capable in themselves of meaning, land not comprised in any settlement, or so much of lands in settlement as is not subject to the trusts of such settlement. In *Strode v. Russell*,^(a) the words were, lands "out of settlement;" Lord Cowper, considering the meaning of the words as standing in equilibrio, thought that evidence might for that reason, according to *Lord Cheyne's case*,^(b) be admitted to determine in which of the two senses the words were used. No equivocation in or flexibility of meaning exists in this case. Here, according to my construction of the *will, [*495] the gift is of all the testator died possessed of. In *The Incorporated Society v. Richards*,^(c) Sir Edward Sugden expresses his disapprobation of *Goodtitle v. Miles*, and says it has been overruled. The case of *Welby v. Welby* is open to the observations I made upon *Strong v. Teatt*; and Mr. Jarman's observations upon that case^(d) are at this day entitled to great weight, namely, that when Sir William Grant decided the case of *Welby v. Welby*, and made the observations which are there found upon *Church v. Mundy*, he had not before him the numerous class of cases which have since, in every instance, decided that a reversion will pass under general words. I think I shall not expose myself to the charge of presumption, by saying, that Sir William Grant was more disposed than other judges, especially in more recent decisions, to relax the rule I proceed upon, and to disregard the strict meaning of words, where he thought it improbable that the testator could have intended what the words strictly interpreted, would express.

^(a) 2 Vern. 621.^(b) 5 Rep. 68, a.^(c) 1 D. & War. 286.^(d) Vol. 1, p. 610.

 1848.—Bateman v. Margerison.

Of this, *Church v. Mundy*, overruled by Lord Eldon, *Miller v. Eaton*(a) and *Jones v. Colebeck*,(b) opposed to *Holloway v. Holloway*,(c) and to the modern decisions, are examples. In the cases of *Say v. Creed*(d) and *Bradley v. Barlow*,(e) I had occasion to examine the authorities, of which the last-mentioned cases are part. I refer to my own decisions not as authorities, but to avoid repetition. I am convinced (and the subject has occupied my mind frequently) that the sound and settled rule of construction, at the present day is that which I stated at the close of the argument for the exceptions, that the words of the will should [*496] be taken to comprehend every *subject which falls within their proper meaning, unless that meaning is excluded by the context, or by the circumstances of the case; and that mere conjecture will not do.

 BATEMAN v. MARGERISON.

1848: April 13th and 19th; May 6th, 9th, 26th, and 31st; and June 1st.

Where property was conveyed to four trustees for such of the creditors of a firm as should execute the deed, and twenty-six creditors (including the four trustees) executed the deed, a suit instituted seventeen years afterwards by some of the creditors, on behalf of themselves and the others, was sustained against the trustees, they objecting that it was defective for want of the other creditors as parties.

In a suit by some of many creditors, on behalf of themselves and the others, for an account of property which had been vested in the defendants, the trustees, for the benefit of such creditors, and one of the trustees died after answer, the other trustees are not necessary parties to the bill of revivor, or revivor and supplement, against the representatives of the deceased trustee.

The author of the trust, or his personal representative, is a necessary party to such a suit; and he is not regularly or properly a party thereto by being a defendant to a bill of revivor, or revivor and supplement, against the representatives of a trustee who died after the institution of the suit, even though all the trustees are (unnecessarily) parties to such bill of revivor, or revivor and supplement; he must be made a party to the original bill, or to a bill in which the trustees are all properly defendants.

 (a) Sir G. Coop. 272.

(b) 2 Ves 38.

(c) 5 Ves. 399.

(d) 5 Hare, 580.

(e) Id. 589.

1848.—Bateman v. Margerison.

An averment in the bill, that a defendant had obtained a grant of letters of administration of the estate, and was the legal personal representative of the author of the trust, is sufficiently proved by the production of such letters of administration, notwithstanding they appear to have been granted on a date subsequent to the institution of the suit.

A person, not a trustee, who is a party to a breach of trust committed by a trustee, may or may not (at the option of the plaintiff, a cestui que trust) be made a defendant to a suit against the trustee in respect of such breach.

Under an order made at the hearing of the cause, giving the plaintiff leave to amend his bill, by adding proper parties, with apt words to charge them, or by stating reasons to show why particular persons should not be parties, or to file a supplemental bill, the plaintiff may amend by stating a grant of letters of administration to the estate of a deceased person to one who is already a defendant in the suit, and by expunging a statement which the bill originally contained, that the deceased person had died insolvent, and had no personal representative.

THOMAS HOLMES and Wainman Holmes, worsted spinners, under the name of Holmes & Son, being indebted to various persons, Thomas Holmes, by indenture dated the 11th of September, 1829, conveyed to John Blackburn, Richard Margerison, David Wilcox, George Haight, and their heirs, all his mills, factories, dwelling-houses, and real estate, situated at Baildon, in Yorkshire, (subject to a mortgage to Hustler and Blackburn, upon trust for sale, at any time, according to their discretion; and the said Thomas Holmes thereby also assigned unto the same trustees, their executors, &c., all the stock in trade, goods, furniture, &c., ready money, bills of exchange, securities, chattels, and effects in and about the said premises, upon trust to carry on, or join in carrying on, the said trade *or [*497] business of a worsted spinner, or to discontinue the same, as they or the survivors should deem most prudent; and, if they should not think it prudent to carry on the business, then to sell and dispose of the said effects and premises, and, after paying the expenses of the trust, to divide and distribute the residue of the trust moneys amongst themselves and such other the creditors of Thomas Holmes and Wainman Holmes as should execute the deed within a month from the date thereof, in proportion to their respective debts, and in full discharge thereof, and to pay the surplus (if any) unto Thomas Holmes, his executors, &c.; and the deed provided that the shares of such of the creditors as

1848.—*Bateman v. Margerison*.

refused to accept the provision thereby made should be paid to Thomas Holmes and Wainman Holmes. The deed was executed by several creditors of the firm of Holmes & Son. The trustees undertook the trusts, and subsequently paid the creditors a dividend of 15s. in the pound upon their debts. The bill was filed in 1846 by five of the creditors, who executed the trust deed of September, 1829, on behalf of themselves and all others the creditors of Thomas Holmes and Wainman Holmes, against Margerison, Wilcock, and Haight, the executor of Blackburn, and Wainman Holmes; and it prayed an account of the several debts due to the creditors of Holmes & Son who executed the deed of September, 1829, and an account of the moneys which had come to the hands of the trustees in respect of the property thereby assigned, and that they might be ordered to pay what should be found due from them in or towards satisfaction of the debts of the plaintiffs and the other creditors. The bill charged the trustees with various breaches of trust, and, among others, with having paid or allowed larger sums to the mortgagees Hustler and Blackburn, than they were entitled to. The bill stated that Thomas Holmes had died insolvent, and that he had no personal representative.

[*498] *The trustees, by their answers, denying the breaches of trust, alleged that their accounts had been approved of and adopted at meetings of creditors, which took place several years before the suit was instituted; and the plaintiffs, with knowledge of what had taken place, had acquiesced in such settlement. They also submitted that the other creditors, a representative of Thomas Holmes, and Hustler, the other mortgagee, were necessary parties.

Wilcock, one of the trustees, died after his joint and several answer had been put in with that of the other trustees; and a bill was filed against his representatives, and against the surviving trustees, to revive the suit, and praying a subpoena to revive and answer against the representatives of Wilcock,—praying also general relief.

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At the hearing of the cause the trust deed was produced ; and it appeared that there were, in the whole, the seals of twenty-six parties executing the deed as creditors, including the trustees,) or twenty-two parties to the deed of the third part, and that some of the parties had executed the deed for themselves and partners.

The *Solicitor-General* and Mr. *Humphry*, for the plaintiffs.

Mr. *Bacon* and Mr. *Bloxam*, for the defendants Margerison and Haigh, and the representatives of Wilcock,—and Mr. Moxon, for the executor of Blackburn,—objected that all the creditors of Holmes & Son who had executed the deed were necessary parties. The deed was produced in evidence ; and by that deed it did not appear that the creditors were so numerous as to entitle the plaintiffs to sue as representing the absent creditors *as well as themselves: they insisted also on [*499] the other objections, for want of parties, raised by the answers

The VICE-CHANCELLOR overruled the objection as to Hustler, the other mortgagee. If Hustler were a party to a breach of trust on the part of the trustees, the creditors might pursue their remedy against him in respect of such participation, but they were not bound to do so.

The *Solicitor-General* referred to *Smart v. Bradstock*, (a) in which a suit was filed by some on behalf of the rest, where the parties interested were twenty-seven in number, and the deeds were twenty years old. In this case the time was scarcely less, and the number, allowing for the additional parties who might reasonably be considered as interested as partners with the persons who had actually executed, would possibly be more, but, at least, would be equal.

April 19th.—The VICE-CHANCELLOR said the length of time,

(a) ? Beav. 500.

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so far as the partnerships were concerned, would tend to reduce the number of parties; for, as the members of the several firms were diminished by deaths, the survivors only would be interested. He thought, however, the circumstances were so near those of the case cited, that he should be following the authority of the Master of the Rolls in disallowing the objection.

There was no evidence as to the intestacy or insolvency of Thomas Holmes; but it was stated at the bar, that letters of administration of the estate of Thomas Holmes, dated the [*500] *11th of April, 1848, (two days before the hearing,) had been granted to the defendant Wainman Holmes; and his counsel submitted to appear for him as well in his representative character as in that of a defendant personally. The other defendants objected to this course being taken; (a) and by an order which, as drawn up, was intitled in both causes, it was ordered as follows:—"That this cause do stand over, with liberty for the plaintiffs to file a supplemental bill, or to amend their bill by adding proper parties thereto, with apt words to charge them as they shall be advised, or by stating reasons why any particular person or persons should not be parties, and to bring on the cause again to a hearing, as they shall be advised."

The plaintiffs did not amend the original bill, but amended the bill which had been filed upon the death of Wilcock; and therein charged, "that, since the filing of the original bill, letters of administration of the estate and effects of the said Thomas Holmes, deceased, have been granted by and out of the proper Ecclesiastical Court to the said Wainman Holmes, one of the next of kin of the said Thomas Holmes, deceased; and the said Wainman Holmes thereby became, and has ever since continued to be, the legal personal representative of the said Thomas Holmes, deceased." No answer was required, and the cause again came on.

(a) See *Dyson v. Morris*, 1 Hare, 413, 420, as to the rule of the Court where a party not named on the pleadings is willing to appear and submit to a decree. It is not to be inferred from the judgment in that case (pp. 419, 420) that a plaintiff can set down the cause, if a defendant named in the bill has not appeared.

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May 6th.—Mr. *Bacon*, Mr. *Bloxam*, and Mr. *Maxon* objected that the frame of the suit was still imperfect. They *contended that the bill against the representatives of [*501] Wilcock was a bill of revivor only; and the representatives of Wilcock only having answered, and the order for revivor being made, the office of the bill of revivor was at an end. It was no longer a subsisting suit, except as against the representatives of Wilcock. The new defendant was not a party to any suit in which the original defendants were parties.

The *Solicitor-General* and Mr. *Humphry* argued, that the bill which had been amended was not merely a bill of revivor; that it was a supplemental bill; that all the defendants were properly and necessarily parties to the supplemental bill; *Holland v. Baker* ;(a) and that they were not the less parties because no relief was prayed against them. The supplemental bill prayed general relief,—the representatives of Wilcock had answered,—and the cause stood for hearing. It was in such a case equally regular and effectual to amend the supplemental bill as the original bill; and it was more accurate, inasmuch as the fact to be introduced was a fact which had occurred after the institution of the suit.

May 9th.—The VICE-CHANCELLOR said that he did not understand for what reason the original defendants had been made parties to the supplemental bill against the representatives of Wilcock. He was, however, of opinion, that the fact, that the other defendants had been made parties to that bill, did not render it sufficient for the plaintiffs to amend that bill, in order to supply the defect in the suit. It was the original bill which was defective, by the absence of the author of the trust as a party to it. There was no defect in the supplemental *bill; and it appeared to him, therefore, that the order [*502] to amend must be considered as applying to the original, and not to the supplemental bill; and that, if the defect was to

(a) 3 Hare, 68.

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be supplied by amendment, it was the original and not the supplemental bill which ought to have been amended.

An order was made, by consent, that the order of the 19th of April should be varied, by making it an order for leave to the plaintiffs to amend both their original and supplemental bills, or either of them, by adding proper parties thereto, with apt words &c., (as in the former order;) and that the plaintiffs should be at liberty to amend their said bills, or either of them, accordingly, notwithstanding the amendments already made under the said order: the cause to stand over, the plaintiffs paying the costs of the day.

The plaintiffs then amended the original bill, by introducing the statement of the grant to Wainman Holmes of letters of administration of the estate of Thomas Holmes, *instead of the charge* that he died insolvent, and had no personal representative, and amended the bill of revivor, or revivor and supplement, by expunging the words "since the filing of the original bill," in the passage added by the former amendment.

May 26.—The defendants the trustees, or some of them, moved that the original and supplemental bills, respectively amended under the order of the 9th of May might be taken off [**503*] the file of the court, or that they **might* respectively be restored to the same state as the same were respectively in before such amendments.

Mr. *Bacon* and Mr. *Bloxam*, for the motion, contended that the amendments which had been made were not within the terms of the leave which the Court had given; the amendment neither added a party (for Wainman Holmes was previously a party) nor stated reasons why any particular person should not be a party, which were the only alternatives the Court had given to the plaintiffs in the form of amendment. The amendment stated a new fact, inconsistent with the allegations on the original record; and that fact, instead of showing, as the order permitted, why a certain person ought not to be a party, showed, on the

1848.—*Bateman v. Margerison.*

contrary, why he ought to be a party; and the amendment, moreover, struck out a part of the original record. Such amendments at the hearing were now treated as irregularities: *Watts v. Hyde*.(a) The plaintiffs had no other course than that of making the present motion: *Gibson v. Ingo*.(b) The case of *Powell v. Cockerell*.(c) was also mentioned.

The VICE-CHANCELLOR, without calling upon the counsel for the plaintiffs, refused the motion, with costs.

At the hearing,

May 31st.—Mr. *Bacon*, Mr. *Bloxam*, and Mr. *Maxon*, for the defendants the trustees, and representatives of deceased trustees, contended that the bill could not be supported by proof of any fact which occurred after the original bill was filed, and was introduced by amendment: **Wray v. Hutchinson*.(d) [*504] *Pilkington v. Wignall*.(e) The case of *Humphreys v. Humphreys*.(f) was not an authority to the contrary; for that case was overruled by Lord Hardwicke, in *Brown v. Higden*.(g)

VICE-CHANCELLOR:—The cases cited are all cases in which the plaintiff sought to add by amendment facts which occurred after the filing of the original bill, and to obtain relief founded upon such new facts. In the present case, the title of the plaintiffs to the relief which they seek in this suit is in no respect dependent upon the fact, that the defendant Wainman Holmes has become the legal personal representative of Thomas Holmes. If it be found necessary, in the progress of a cause, that the estate of a deceased person should be represented in the suit, and that representative can only be created by going to the Ecclesiastical Court, the bill must always be dismissed at the hearing, if, as it is contended in this case, letters of administration, obtained after the institution of the suit, are not sufficient to enable the Court

(a) 2 Ph. 506.

(d) 2 Myl. & K. 235.

(g) 1 Atk. 291.

(b) 5 Hare, 156.

(e) 2 Madd. 240.

(c) 4 Hare, 557.

(f) 3 P. Wms. 349.

 1848 — *Wyllie v. Ellice*.

to make a decree binding the estate which is so represented. That, however, has not been the practice. I am not called upon to say what the effect of the objection might be in the case of a sole plaintiff averring that he was administrator of a deceased person, and suing in that character, if it appeared he was not such administrator..

June 1.—The Court made a decree for an account.

 [*505]

**WYLLIE v. ELLICE*.

1848: January 28th; February 26th.

A party entering upon, and taking the rents and profits of, an infant's estate, may be sued at law as a trespasser, or in equity as the bailiff, guardian, and trustee of the infant, at the election of the plaintiff.

Where it appears that several persons entered on and held the estate of an infant, one of such persons cannot be sued by the infant in equity as his bailiff, guardian, or trustee, for an account of the rents and profits of the estate, without making parties to the suit the others of such persons.

By the effect of the 37th General Order of August, 1841, the answer put in by a defendant to an original bill, although it extends to matters retained in the amended bill, does not preclude the defendant from demurring generally to such amended bill, by overruling the demurrer, as it would have been held to do before that Order was made.

THE original bill was filed in March, 1847, by William Morrison Wyllie, against the surviving trustees and the representatives of deceased trustees appointed by the will of George Morrison, for an account of the rents and profits of an estate called Courland Castle, in the Island of Tobago, and of the hire and compensation-moneys for certain slaves. The plaintiff claimed one-fourth part of such rents, profits, and proceeds, from the year 1827, as heir-at-law of his mother, one of the tenants in common of the property in question, under a settlement made in June, 1808. The case made by the plaintiff is more fully set forth below, in stating the contents of the re-amended bill. The representatives of the three other tenants in common were defend-

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ants to the original bill. The defendant Edward Ellice, one of the trustees, put in his answer to the original bill. The bill was then amended, and the same defendant put in his answer to the amended bill. The bill was then further amended, and by this amendment the names of all the defendants other than Edward Ellice were struck out.

The re-amended bill stated a settlement of the 13th of June, 1808, whereby George Morison conveyed the Courland Castle estate, and twenty-four slaves to Ellen Morison for her life, with remainder to Martha, Mary, Magdalen, and Eleonora, her four children, and their respective heirs and assigns, as tenants in common; that George Morison died in December, 1814, having, by his will, appointed John Morison, John Reid, Edward Ellice, and Charles Ross, devisees in trust of all his real *estate, and his executors; that the trustees accepted the [*506] trusts, and entered into possession and receipt of the rents and profits of the real estate of George Morison, the testator, and also of the Courland Castle estate, and acted in the execution of the said trusts from the time of the decease of John Reid to the decease of John Morison, and that Edward Ellice and Charles Ross had always acted, and still continued to act, in the execution of the said trusts; that shortly after the death of the testator a suit was instituted in this court, and the same was still pending, for the administration of the trust estate so devised and bequeathed; but the Courland Castle estate formed no part of the subject of that suit.

The bill also stated that Ellen, the mother, died in 1827; and that in August 1818, Martha, one of the children, intermarried with William Wyllie, the plaintiff's father; and that Martha, the plaintiff's mother, died intestate in March, 1822, leaving the plaintiff, then an infant, her only son and heir-at-law.

The bill stated that John Reid died in 1818, and John Morison died in February, 1835.

The bill stated that the Courland Castle estate adjoined one of the devised estates called Les Coteaux, and that the two estates, Courland Castle and Les Coteaux, had always been cultivated together, and the whole of the slaves were commonly located on

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the latter estate; that the profits and produce of the two estates had always been mixed and blended by the said trustees; and that, in order to determine the sum payable to Ellen, the mother, during her life, a valuation and appraisement had been made, according to which 225*l.* 10*s.* a year had been paid by the trustees, for the rent or hire of the Courland Castle estate [*507] and slaves, to Ellen, until her death, and which *payments had been allowed to the defendants, Ellice, in his discharge in the suit of *Morison v. Morison*.

The bill referred to the act 3 & 4 Will. 4, c. 78, for the Abolition of Slavery in the Colonies, and alleged that the twenty-four slaves on the Courland Castle estate had considerably increased in number, and that the said trustees omitted to register them, or to claim compensation for them, and that owing to such neglect some other person registered such slaves and obtained the compensation money; that the plaintiff came of age in December, 1841, and had but recently discovered the settlement of June, 1808, which had been in the possession of Edward Ellice; and that the plaintiff had never received anything in respect of his interest in the said Courland Castle estate or slaves.

The bill charged that Edward Ellice had continued, from the decease of Ellen, the mother, and still was, by himself or his agents or managers, in possession and receipt of the rents and profits of the plaintiff's share in the Courland Castle estate, slaves, and apprenticed laborers, and that he had received, or by his neglect permitted some other person to receive, the said compensation-money; that Inglis, Ellice, & Co. were the London agents of the said trustees, and that the blended produce of *Les Coteaux* and Courland Castle estates was received by Edward Ellice and his co-trustees, or Inglis, Ellice, & Co., and was included in or accounted for by, the said trustees in the said suit; and their discharge included payments made by the trustees for the rent and hire of the Courland Castle property: that John Reid was the agent of the trustees in Tobago until his death, when William Gordon was appointed manager, under an order in the cause; that Alexander McGregor was afterwards appointed by the trustees joint manager with Gordon,

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*without the authority of the Court: that the trustees [*508] also afterwards appointed other managers, named Currie and Chadband; that Edward Ellice was appointed consignee in 1819, and so continued until 1830; that the said agents, managers, and consignees did not, as to their dealings with the Courland Castle property, act under any authority given to them by the will of the testator, or by the Court; that in 1828 an appraisement was made of the slaves attached to the Courland Castle property, then thirty-six in number, at the sum of £1475. The bill charged that no act of William Wyllie, the plaintiff's father, who was the plaintiff's guardian, and next friend in the said suit of *Morison v. Morison*, could prejudice or affect the right of the plaintiff to the relief sought by this suit in respect of the Courland Castle property.

The bill charged that, under the circumstances, the plaintiff being an infant at the time when he became entitled in possession in respect of his one-fourth share or interest in the Courland Castle estate and premises, and when Edward Ellice was in such possession or receipt of the rents, profits, and proceeds thereof, the defendant, Edward Ellice, ought to be considered, and he in fact and in equity constituted himself, and became and was, bailiff, guardian, or trustee, for the benefit and on the behalf of the plaintiff, for and in respect of the plaintiff's one-fourth part, share, or interest in the Courland Castle estate, slaves, and premises; and that the said defendant, having once entered upon or remained in possession of the plaintiff's interest in the Courland Castle estate, slaves, and premises, and made himself bailiff, guardian, or trustee, in respect thereof, for the plaintiff could not in equity throw up and discharge himself from the duties and liabilities of his said office, and was bound and ought to have continued therein *until plaintiff should attain [*509] his age of twenty-one years, and until he could account with the plaintiff and surrender to him his interest in the said estate, slaves and premises, or until he could be otherwise legally discharged from his said office.

The bill prayed that the defendant Edward Ellice might be declared to be the bailiff, guardian, or trustee of the plaintiff, in

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respect of the plaintiff's interest in the Courland Castle estate, slaves, and premises, and that he might be decreed to account with the plaintiff accordingly, and pay to the plaintiff what shall be found due to him upon such account.

The defendant Edward Ellice, who was the only defendant to the amended bill, demurred, for that the three other daughters of Ellen Morison, Mary, Magdalen, and Eleonora, or their respective heirs if they were dead, were not parties to the bill.

Mr. Romilly and Mr. Brett, in support of the demurrer for want of the other cestui que trusts as parties,—the cause assigned on the record. They also insisted upon the absence of the other trustees, under the will of George Morison, as a ground of demurrer *ore tenus*.

Mr. Rolfe and Mr. W. Morris, in support of the bill.

The questions argued were, first, whether the defendant, having answered the original and amended bill, was not precluded from demurring to the re-amended bill; *Atkinson v. Hanway*,^(a) *Ellice v. Goodson*,^(b) *Esdaile v. Molyneux*; ^(c) or whether this objection to answer, and demurrer to the same record, was not obviated by the 37th General Order of August, 1841, or if not, by the fact that the bill had been so changed by the amendment, as against the defendant, as to entitle him to meet it with a new defence: *Ritchie v. Aylwin*,^(d) *Cresy v. Bevan*.^(e) If, for either reason, it was still open to the defendant to demur, whether the other parties interested in the rents and profits of the Courland Castle estate and slaves, as tenants in common with the plaintiff, were necessary parties; *Williams v. Powell*,^(f) *Mare v. Malachy*,^(g) *Turner v. Hill*; ^(h) or whether the other trustees charged by the bill to have acted with the defendant Ellice in the trusts of the will of George Morison, and

(a) 1 Cox, 360.

(b) 3 Myl. & Cr. 653.

(c) 2 Coll. 636.

(d) 15 Ves. 79.

(e) 13 Sim. 354.

(f) 2 Phill. 329.

(g) 1 Myl. & Cr. 559.

(h) 11 Sim. 1.

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in the blending of the Courland Castle property with the devised property, were necessary parties: *Lenaghan v. Smith*,^(a) *Hall v. Austin*.^(b)

VICE-CHANCELLOR:—The bill in this case, as it was originally framed, sought to charge the defendant Edward Ellice, and the other trustees under the will of George Morison, in favor of all the cestui que trusts of the Courland Castle estate, and all the cestui que trusts were parties to the suit. Answers were filed to the bill by the defendant Edward Ellice, and (as was stated at the Bar) by some of the other parties; and the bill has since been amended by making it a bill against the defendant Edward *Ellice only, who has thereupon demurred for [*511] want of parties.

The case upon this bill (as I understand it) is this; that the defendant Ellice, (whether alone or jointly with others,) unlawfully and without authority, entered upon the plaintiff's estate and held the same, and received the rents and profits during his infancy, and thereby became accountable to the plaintiff as bailiff, guardian, or trustee for what he received belonging to the plaintiff; and that he has, in the circumstances stated in the bill, continued liable for subsequent rents and profits, and relief is prayed accordingly. The bill, in fact, insists, that having once occupied the Courland Castle estate as bailiff, guardian, or trustee for the plaintiff, the trustees could not lawfully give up such occupation, and that they remain still liable. Some criticisms were applied to the words "bailiff, guardian, or trustee" in the bill. I will dismiss that part of the argument with the observation, that the words "bailiff, guardian, or trustee," as I understand them in this bill are synonymous expressions; but (whether that be so or not) the attempt to charge the defendant Ellice in any event as trustee will be sufficient for the present purpose.

I do not intend to enter upon the question which was elaborately argued before me in *Boddy v. Lefevre*,^(c) in January, 1842,

(a) 2 Phill. 301.

(b) 2 Coll. 570.

(c) See 1 Hare, 602, n.; see also 3 Hare, 5; 8 Beav. 250.

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and in which a great number of cases were cited—the question, what the circumstances are which will entitle an infant, after twenty-one, to proceed by bill in this Court for an account against a party who has entered upon the infant's estate and received the rents and profits during his minority. I will [*512] refer only *to *Newburgh v. Bickerstaffe*(a) and *Doe v. Keen*(b). In this case, according to the bill, the trustees under George Morison's will (in the trusts of which it appears that the plaintiff had such an interest as made him a necessary party to the suit of *Morison v. Morison*) did not enter upon the Courland Castle estate adversely to the infant. On the contrary, the Courland Castle estate was annexed by the trustees, in cultivation and management, to Les Coteaux (one of the devised estates;) the slaves of the two were worked together, the rents and profits blended and mixed, and the right of the plaintiff and the other parties interested under the deed of June, 1808, was acknowledged throughout: and, as I understand, (though this is not necessary to my argument,) the Courland Castle estate, though not mentioned in the bill in *Morison v. Morison*, was the subject of charge and discharge in the Master's Office. I shall therefore assume, in the plaintiff's favor, that the defendant Ellice was, or that Ellice and his co-trustees were, accountable to the plaintiff for the rents and profits of Courland Castle. But, upon the question whether the plaintiff can sue Ellice alone, another point must be considered. Admitting that the plaintiff may sue Ellice as bailiff, guardian, or trustee, I apprehend he is clearly not bound to do so; he may elect to treat him as a trespasser, and to pursue his rights elsewhere. If Mr. Ellice (as the bill says) entered upon the plaintiff's land unlawfully and without authority, Mr. Ellice cannot (unless under special circumstances) have a right to say the plaintiff shall not treat him as a trespasser, but shall sue him in equity and not elsewhere. It is only by electing between two remedies that the plaintiff brings Mr. Ellice here. Then the question [*513] arises, whether, if the *plaintiff elects to treat his

(a) 1 Vern. 295.

(b) 1 T. R. 389, 390; and 2 Fowl. Eq. 238.

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entry, not as adverse but as that, of a bailiff, guardian, or trustee, he must not adopt the case which actually occurred; and if, in fact, Mr. Ellice entered or held Courland Castle on the plaintiff's behalf, not alone, but jointly with others, as stated in the bill, whether the plaintiff so electing must not treat all as bailiffs, agents, or trustees, and not any separately? I do not find any case directly touching this point. But, upon principle, it appears to me that such must be the rule of the Court. The plaintiff may treat a party who enters upon his land, being the estate of an infant, and receives the rents and profits without authority, as a trespasser. Equity, at the election of the owner of the estate, will permit him to treat the party in possession as bailiff, guardian, or trustee. But if the owner elects to take his equitable remedy, it must, I conceive, be upon equitable terms, and those terms must, I think, in the circumstances stated in this bill, require that all parties jointly liable with Ellice should be made accountable with him.

It may not be immaterial on the question, whether the other trustees ought to be parties in this case, to advert to the fact which appears on the bill, that some moneys have been accounted for in the suit of *Morison v Morison*, in respect of the rent and hire of the Courland Castle estate and slaves. It is not, however, necessary that I should rely upon this ground for requiring the other trustees to be brought before the Court in this suit.

It is also objected by the defendant, that the other cestui que trusts, Mary, Magdalen, and eleonora, or their representatives, are necessary parties to this suit. Upon this point, (which is the ground of demurrer assigned upon the record,) I think the demurrer cannot *be sustained. I cannot find [*514] in the bill any averments showing whether the other cestui que trusts, or any of them were infants or not at the death of Ellen Morison, the mother, nor whether their shares of the Courland Castle property have been accounted for to them or not; nor whether they were interested in the devised estates; nor whether they were parties in the suit of *Morison v Morison*; nor any other allegation showing their position, except that they

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were respectively entitled to one-fourth of Courland Castle estate.

Now, if Mary, Magdalen, and Eleonora were not infants at the death of Ellen Morison, their mother, the tenant for life of Courland Castle, they could not have sustained a bill in equity for relief of the nature sought in this suit; and if they were infants, they were not bound to proceed in equity. In the absence, therefore, of all special circumstances, the other cestui que trusts are not amenable to the jurisdiction of the Court, as between Ellice and themselves; and if that be so, they might demur, if they were made parties, and if, as against them, the bill would be demurrable, the plaintiff cannot be compelled to make them parties to the suit. It may be said, indeed, that the ground upon which I have held that the trustees should all be parties, extends to the cestui que trusts; but a decision to that effect would be to hold that Mr. Ellice, by the wrongful acts which are alleged, might deprive the plaintiff of his equitable remedies against himself, which plainly cannot be.

Then, as to the questions of form: it was said that Mr. Ellice, having answered the original bill, could not demur to the amended bill. To this objection two answers were given; First, it was said that the original bill was so completely [*515] changed by the amendments, *that the answer upon the record to the original bill was not an answer to the amended bill. Secondly, that the 37th General Order of August, 1841, has taken away the ground of the objection, that the answer will overrule the demurrer.

If the original bill had been so changed as the argument for the defendant supposes, there would certainly be no question that the defendants should be allowed the same discretion as to the form of his defence, as if he came entirely upon a new record; but I am not prepared to admit that any such change has been made on this record. The answer of Mr. Ellice was his several answer to the bill; and whatever be there admitted as his own act, whether alone or jointly with his co-trustees is an answer, in part, to the amended bill. I cannot admit that an attempt to charge him alone by an amended bill, the original bill

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having sought to charge him in a suit in which other persons were parties, is such a variation of the subject of the suit, that the former proceedings are to be disregarded in considering the form of the defence to the amended bill.

I am however, satisfied that the 37th Order of August, 1841, applies to the present case, and is an answer to the objection founded upon the fact that the defendant has answered the original bill. The ground of the general proposition is, that the amended bill is the original bill amended and written upon; and if that be so, the answer to the original bill, and the answers to the amended bill, must be taken together as one answer to the entire record. It is evidently the practice so to regard it; for if a defendant should, in his answer to an amended bill, repeat his answer to matters which he had answered before, such repetition would be subject to exception for impertinence.

*The 37th Order was made for the purpose of relieving defendants from the difficulty which previously existed in framing their defence by demurrer or plea, owing to the strictness of the rule that prevented them from answering any part of the bill to which the demurrer or plea properly extended. If the 37th Order was required for the relief of defendants in cases where the answer and demurrer or plea were contained in the same instrument, a fortiori would it be necessary in cases where the bill is amended, after answer, and where the defence is to be made by a further instrument, which, with the former answer, is to constitute only one record. The case cannot be stated more strongly for the plaintiff, than by supposing that the material facts stated in the amended bill are covered by the answers already put in by the defendant. Under the 37th Order, the defendant may notwithstanding demur to the amended bill; and, for the reasons which I have stated, I allow the demurrer.

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1848: 30th June; 1st July.

The clauses of the statute for the relief of insolvent debtors, which provide that, in case the insolvent shall be entitled to any copyhold or customary estate, the assignment to or certified copy of the appointment of the assignee shall be entered on the court rolls of the manor, and that the assignee shall, with all convenient speed, make sale of all the estate and effects of the insolvent, are not mandatory, but are directory only.

The omission of the assignees of an insolvent debtor to sell or take possession, of the copyhold estate of the insolvent or to cause an entry of the assignment or copy of the appointment of the assignee to be made on the court rolls, or to possess themselves of the copies of court roll for a period of nineteen years after the insolvency, whereby the insolvent is enabled to retain the property and hold himself out as the owner, and mortgage it for value to a person who had no actual knowledge of the insolvency, does not constitute an equitable ground for giving such mortgagee a charge in priority to the title of the assignee.

An appointment of a person claiming to be a creditor of an insolvent debtor, assignee of his estate and effects in the place of a deceased assignee, on condition that the person so appointed shall prove his debt by affidavit on taking out his appointment, such debt having been afterwards proved accordingly, is a valid appointment, entitling the party so appointed to sustain a suit for the purpose of recovering property claimed as part of the estate of the insolvent.

JOSEPH ELLIS, the devisee, under the will of his father, of a copyhold tenement held of the manor of Launton, in the county of Oxford, (to which the father had been admitted in 1770,) in September, 1824, took the benefit of the act then in force for the relief of insolvent debtors, and thereupon conveyed and assigned all his real and personal estate to the provisional assignee, who, in November following, duly conveyed and assigned the same estate to one Powell, the permanent assignee, for the benefit of himself and the other creditors of the insolvent. The schedule filed by the insolvent mentioned the copyhold tenement as being part of his estate, and stated where the copies of court roll were.

Powell, the assignee, permitted the insolvent to continue in the occupation and enjoyment of the copyhold tenement, out of compassion (as was alleged by the plaintiff in this cause,) and he

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also allowed the copies of court roll to remain in the possession or power of the insolvent. No entry of either of the assignments to the assignees of the insolvent, pursuant to the 7th section of the statute 1 Geo. 4, c. 119, (the statute then in force, which corresponds with the 20th section of the statute *7 Geo. 4, c. 57, and the 47th section of the 1 & 2 Vict. [*518] c. 110,) was made on the rolls of the manor, until the year 1843, after the death of the insolvent. Powell died in 1828. No steps were taken for the appointment of another assignee until 1843, and the insolvent continued in possession of the copyhold tenement until his death. The insolvent was admitted tenant to the premises at a Court holden in August, 1839.

In February, 1840, the defendant, John Coles, who had no knowledge of the insolvency, lent the insolvent 50*l*. upon mortgage of the copyhold tenement; and the insolvent then made a conditional surrender of the premises to John Coles, as such security, before two tenants of the manor, according to the custom, and delivered to the plaintiff the copies of court roll, of the admissions of his father in 1770, and himself in 1839. This sum, with interest and further charges, amounting in the whole to about 100*l*., was due to the defendant, John Coles, at the death of the insolvent, which took place in December, 1842.

On the 30th of March, 1843, the Court for the Relief of Insolvent Debtors appointed the plaintiff assignee of the estate and effects of the deceased insolvent, in the place and stead of Powell, by an order in the following form:—"That William Cole, creditor &c., shall be, and the said William Cole is hereby appointed, new assignee of the estate and effects of &c., upon the said William Cole proving his debts by affidavit on taking out his appointment." In the month of April, 1843, the plaintiff made and filed an affidavit of his debt, according to the terms of the order. No conveyance or assignment was made to the plaintiff by any representative of Powell; but soon after the appointment of the plaintiff as assignee, notice was given to the steward of the manor of *the proceedings in the insol- [*519] vency, and the assignments under the same; and the

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steward refused to admit the defendant, John Coles, on his presenting the conditional surrender of February, 1840.

On the 7th of July, 1843, the plaintiff, after calling a meeting of the creditors, caused the copyhold premises, to be offered for sale by auction, at which the defendant, John Coles, attended, and was the highest bidder, claiming at the same time to be a mortgagee of the property. He subsequently insisted upon a right to deduct the amount of his mortgage debt from the purchase-money.

The bill was filed by William Cole, the assignee, for specific performance of the contract by payment of the purchase-money. The bill charged that the defendant knew of the insolvency before the time of his pretended mortgage; that nothing was due on the mortgage; and that the defendant never in fact advanced money to the insolvent. The bill minutely inquired into the particulars, and put the defendant to strict proof of the alleged loan. At the hearing,

The VICE-CHANCELLOR, upon the opening of the cause, said, that the proper course would be to direct the usual reference of title to the Master.

It was then stated, and agreed on both sides, that, assuming the plaintiff to have been, before the bill was filed, duly appointed assignee of the estate of the insolvent in the place of Powell, (which the defendant did not admit,) the only questions between the parties were, first, whether the defendant was entitled to retain the amount of his mortgage debt out of the purchase money; and, secondly, the costs of the suit? All [*520] *objections to the title, except that arising out of the defendant's claim, being waived, the questions were argued: *Parrott v. Sweetland*.(a)

Mr. C. P. Cooper and Mr. Simpson, for the plaintiff.—The directions in the Insolvent Debtors Act concerning entering the as-

(a) 3 Myl. & K. 655.

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signment on the rolls of a manor, and as to the time and mode of selling the estate, are merely directory: *Doe v. Glenfield*,^(a) *Doe v. Evans*,^(b) *Mather v. Priestmen*.^(c) The circumstance, that the defendant was deceived by the insolvent, and induced to advance money on the mortgage, was the defendant's own fault, for he might have searched the Insolvent Lists.

Mr. *Shapter*, for the defendant.—The plaintiff has not shown a title to maintain the suit, inasmuch as his appointment as assignee was only conditional on his proving his debt, and there is no such officer as a conditional assignee. And, in order fully to invest the plaintiff with his character of assignee, the property should be vested in him.^(d) The legal estate was vested in Powell, the former assignee; *Doe v. Glenfield*; ^(e) and, upon his death, the same vested in the heir or devisee. It is true the 14th section of the statute 1 Geo. 4, c. 119, provided that, in case of the death of the assignee, the Court might appoint a new assignee, and that, by his appointment, the estate should vest in him; but that statute was repealed in 1826 by the statute 7 Geo. 4, c. 57, except as to the powers given to the Court; and the provision as to vesting the *property of insolvents or [*521] their assignees by their appointment, was only renewed as to new insolvencies. Secondly, the assignees of the insolvent's estate have not in this case taken the steps necessary in order to acquire the priority. The authorities referred to for the position, that the clauses in the Insolvent Debtors Act concerning registration and sale are merely directory, are cases relating to the right of the assignees against the insolvent or those claiming as volunteers under him. Even this may be questioned on the authority of *Searle v. Law*,^(f) in which case it was held, that the directions of the statute 31 Geo. 4, c. 126, as to the mode of transferring turnpike bonds, are mandatory and essential. Those authorities have no application to the case of a purchaser for value, bona

(a) 1 Bing., N. S., 729.

(b) 1 Cr. & M. 450.

(c) 9 Sim. 352.

(d) *Owen v. Owen*, 1 Atk. 496; *Fbley v. Wontner*, 2 J. & W. 248; *Warburton v. Sandys*, 14 Sim. 631.

(e) 1 Bing., N. S., 731.

(f) 15 Sim. 95.

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fide, and without notice. The principal of the enactment requiring the assignee to enter on the rolls his title to copyholds, is to protect purchasers, as appears from the analogous provisions found in the statutes 5 & 6 Vict. c. 116, s. 8, 1 & 2 Will. 4, c. 56, ss. 26 and 27, and 6 Geo. 4, c. 16, s. 64. There was in this case, on the part of the creditors of the insolvent, or the assignee who represented them, such gross negligence in allowing the insolvent to occupy and enjoy the property from his insolvency in 1824 until his death in December, 1842,—in not possessing themselves of the copies of court roll,—in not selling, and in not entering their title on the rolls, that the title of the defendant as mortgagee ought to prevail: *Evans v. Bicknell*,^(a) *Whitbread v. Jordan*.^(b) Lastly, on the question of costs. Whatever the decision of the Court may be on the principal question, of the right of the defendant as mortgagee, the plaintiff, who has impeached by his bill the existence and truth of the defendant's debt, and has [*522] *wholly failed on that part of his case, ought to pay the costs of that part of the suit: *Glascott v. Lang*.^(c)

VICE-CHANCELLOR:—It does not appear to me that there is any difficulty in regard to the form in which the appointment of the plaintiff as the new assignee has been made. The Court for the Relief of Insolvent Debtors are empowered to make the appointment; and I must assume that the creditors are satisfied with the course which has been taken, and that the plaintiff is well appointed. With regard to the assignment of the legal estate, the statute 1 Geo. 4, c. 119,^(d) enacts, that, upon the appointment of a new assignee, the estate of the former assignee shall immediately vest in him. But if neither the plaintiff nor the defendant have the legal estate, the plaintiff has the earlier and better equitable title. The mere possession of the legal estate is not material in this case, which is a suit for specific performance, and in which the question in whom the legal estate is vested raises only a question of conveyance.

(a) 6 Ves. 174.

(b) 1 Y. & C. 330.

(c) 2 Phil. 310.

(d) Sect. 14, and 7 Geo. 4, c. 57, s. 38.

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This is certainly a hard case upon the defendant; but I do not see anything in the circumstances which affords a ground for rendering him equitable relief. The insolvent was permitted to appear ostensibly the owner of the property, but he did not thereby acquire any new title. The insolvent or the defendant himself may have continued in possession of the property for nineteen years and a half, but that would not give the party who so retained possession a defence at law against an ejectment; and this is a case in which equity *must follow the law. [*523] The fact, that the title-deeds of an estate have been left in the possession of a party to whom they did not belong, is not alone a ground of equity in favor of a third party, who has been thereby deceived. Copies of court roll are not strictly within the description of title-deeds. All the information which they could afford may be found on the court rolls; and there is, therefore, still less reason for giving weight to the circumstance, that the copies were under the control of the insolvent, than if the instruments were properly title-deeds. The defendant, moreover, might have searched the lists of insolvent debtors. I cannot say there has been that gross negligence on the part of the assignee as should induce a Court of equity to interpose on behalf of a mortgagee to postpone the creditors of the insolvent.

The provisions of the statute which relate to the entry of the assignment on the court rolls, where the insolvent is entitled to any copyhold estate, and to the sale of the estate of the insolvent with all convenient speed, point out the duties to be performed by the assignee, as an officer of the court for the benefit of the creditors. But I think those provisions are directory only, and that it is not open to any third person to dispute the validity of the title of the assignee on the ground that the steps so directed to be taken have been delayed or omitted.

The defendant then insists that the plaintiff ought to pay the costs of the suit, or so much as have been occasioned by his denial of the debt claimed by the defendant, to be charged upon the estate. I do not understand the bill as doing more than challenging the claim of the defendant, and putting him to establish his alleged mortgage. The bill does not charge the defendant

 1849.—Smith v. Smith.

[*524] with *any fraud. It is nothing but the common case of a disputed claim.

Declare that the plaintiff is well appointed assignee of the estate and effects of Joseph Ellis; and the defendant, by his counsel, waiving a reference as to the title to the estate, decree that the agreement of the 7th of July, 1843, be specifically performed and carried into execution. Let the plaintiff convey, assign, or surrender the premises to the defendant, or to whom &c.; and let the Master settle such conveyance, assignment, or surrender, in case the parties differ about the same; and upon the plaintiff executing such conveyance, assignment, or surrender, let the defendant pay to the plaintiff the sum of 140*l*., the remainder of the purchase money, with interest at 4*l*. per cent. from the 2nd day of March, 1844, and the costs of the suit to be taxed, &c. Liberty to apply.

Affirmed by the Lord Chancellor, Nov. 16th, 1848.

SMITH v. SMITH.

1849: 16th February.

If a defendant, who has been examined by the plaintiff as a witness in the cause, submits to a decree against himself, notwithstanding such examination, the fact of that examination having been had cannot be sustained by the other defendants who have not been examined, as an objection to a decree against them.

A SUIT against trustees and executors. The plaintiff examined two of the defendants, the trustees, as witnesses in the cause.

The *Solicitor-General* and Mr. *Amphlett*, for the plaintiff.

Mr. *Kenyon Parker* and Mr. *Hardy*, for a defendant, another trustee, submitted that the bill must be dismissed. The Court could not make a decree against the defendant, who had been examined as a witness for the plaintiff; and the decree
 [*525] could not be made *against the other trustee alone:
Champion v. Champion.(a)

 1848.—Salisbury v. Salisbury.

The trustees, who had been examined, did not object to the decree being made, as against themselves.

VICE-CHANCELLOR:—The defendants who have been examined as witnesses by the plaintiff were, *prima facie*, discharged from liability in this suit by the course so taken by the plaintiff. But the examination of those defendants does not necessarily affect the other defendant. The only objection which arises, so far as he is concerned, is, that the decree cannot be made against him unless it be also made against the co-defendants. If, then, the defendants, who might take the objection that they are discharged from the suit by the mere fact of their examination, appear, and submit to the decree of the Court, and thereby take upon themselves a renewed liability in the suit, it is not open to the other defendant to object that they ought not to do so; and, in that case, the examination does not preclude the Court from making the decree. The defendant who has taken the objection cannot have anticipated the course taken by the plaintiff; he cannot, therefore, have been misled by it in the conduct of the suit.

*SALISBURY v. SALISBURY.

[*526]

1848: 5th, 7th, and 10th, July.

Where a husband covenanted by his marriage settlement, to give, devise, bequeath, and secure to his widow an annuity for her life after his decease, to be levied, raised, and paid to her by his heirs, executors, or administrators, and the husband afterwards died intestate—It was held, on the authority of *Crouch v. Stratton*, that the widow's share of the husband's personal estate, under the Statute of Distributions, was not to be taken by her as a performance of his covenant, either wholly or pro tanto.

THE settlement made in 1843, prior to the marriage of Thomas Salisbury, the intestate, with Elizabeth, his wife, recited, that, upon the treaty for the said intended marriage, it was agreed that the said Thomas Salisbury should, in the event of the said Elizabeth surviving him, secure to her, during the term of her natural

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life, an annuity or yearly sum of 500*l.* at the least; and contained a covenant, by Thomas Salisbury with the said Elizabeth, that, after his decease, his heirs, executors, or administrators should levy and raise, out of his real and personal estate, one annuity or yearly sum of 500*l.*, by equal half-yearly payments, to commence and be made within six months after his decease, and should pay the same annuity of 500*l.*, when and as the same should become due and payable, into the proper hands of the said Elizabeth, or unto her order, (signified as therein mentioned,) for her separate use, independent of any future husband. And the said Thomas Salisbury covenanted with the said Elizabeth, that he would, by his last will and testament in writing, give, devise, bequeath, and secure to her the said annuity of 500*l.* at the least, as aforesaid.

Thomas Salisbury died in 1847, intestate; and the said Elizabeth, his widow, was his administratrix. The bill was filed by the only child of the marriage, and prayed a declaration that the provision made by the settlement for the defendant was in bar of any claim which she might be entitled to make upon the estate of the intestate as his widow, and that she was not entitled to be paid thereout any sum beyond the annuity of 500*l.*;

or that it might be declared that the covenants in the [*527] *settlement, on the part of the intestate, had been performed and satisfied by the share of the personal estate of the intestate to which the defendant became entitled as his widow, under the Statute of Distributions, if such share were greater or equal in value to the annuity of 500*l.*; and, in case such share were less in value than the annuity, that the said covenants had been performed so far and for so much as the said share would extend to; and that it might be declared that the defendant was not entitled to be paid the annuity of 500*l.* out of the intestate's personal estate, in addition to, and independently of, her share as his widow, under the Statute of Distributions.

The administratrix, by her answer, admitted that the personal estate of the intestate amounted to about 21,000*l.*, and claimed her annuity of 500*l.*, and also her widow's share of the residuary estate, under the Statute of Distributions. After providing for

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the payment of the annuity, the Master found, that the infant plaintiff and the administratrix were the next of kin, and parties entitled, under the statute, to the personal estate of the intestate, and that the debts were paid. On the hearing for further directions,

The *Solicitor-General* and Mr. *Alston*, for the plaintiff.

Mr. *Rolt* and Mr. *Sidney Smith*, for the defendant.

On behalf of the plaintiff, it was contended, that the distributive share of the personal estate left by the intestate, to which the widow would be entitled under the statute, was a performance of the covenant, either wholly *or in part; and [*528] that, if the performance was partial only, it must be taken *pro tanto*. This was the settled law, in case of a covenant, to leave a gross sum, or a fixed sum of money equivalent to the value of an annuity, at the death of the covenantor, and there was no sound distinction between the case of an annuity and an ascertained sum. There might be partial performance. It was not necessary for this purpose that there should be a satisfaction. In the case of *Couch v. Stratton*,^(a) the point, whether an annuity should not be governed by the same rule as was applicable to a gross sum, was not argued. It was assumed by the Court, as well as by counsel, that, as to the annuity or life interest of the administratrix in the fund which she did not take absolutely, the administratrix was entitled to the benefit of that part of the covenant, without regard to her distributive share; and Lord Rosslyn held, that the covenant was entire, and that he could not take that to be a satisfaction of part of a covenant, which did not even pretend to satisfy the rest; and, therefore, it followed, that the covenant was not satisfied: it was not argued that it was either wholly or partly performed.

On the part of the defendant, it was said, that the argument on the other side would have had more force, if it had been pos-

(a) 4 Ves. 391.

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sible (which it was not) for the case to have been put, on the part of the plaintiff, as a case of satisfaction. Where satisfaction could be insisted upon, the covenant was so moulded in construction as to make it fit the act which was done—the intestacy. But where the proposition was, that the act covenanted to be done was actually performed, there was no scope for any [*529] departure from the strict terms of the covenant. *The plaintiff might, with some plausibility, have contended, that the obligation was satisfied; but it was impossible to say that the terms of the present covenant had been performed. The other cases cited were, *Blandy v. Widmore*, (a) *Lee v. D'Aranda*, (b) *Garthshore v. Chalie*, (c) *Kirkman v. Kirkman*, (d) *Goldsmid v. Goldsmid*, (e) *Broughton v. Errington*, (f) *Haynes v. Mico*, (g) *Barret v. Beckford*, (h) *Devese v Pontet*. (i)

VICE-CHANCELLOR:—The rule adopted in the decisions upon this question appears to me to be purely arbitrary. Lord Eldon, in *Garthshore v. Schalie*, (k) has referred the case to a principle; but, in the absence of that explanation, it would be difficult to see why the right of the widow to her distributive share should be excluded by her right under another contract. In the case, however, of a covenant to pay a gross sum, the question as Sir Thomas Plumer has said, in *Goldsmid v. Goldsmid*, (l) is no longer open. Lord Eldon, in reasoning on the case of *Garthshore v. Chalie*, noticed, as the ground of his decision, that this Court had infused into the construction of the husband's contract considerations which a Court of law could not. He said, that the case of *Blandy v. Widmore*, and the cases following it, "were distinct authorities that, where a husband covenants to leave, [*580] or to pay at his death, a *sum of money to a person who, independent of that engagement, by the relation between them and the provision of the law attaching upon it, will take a provision, the covenant is to be construed with reference to

(a) 1 P. Wms. 324.

(d) 2 Bro. C. C. 95.

(g) 1 Bro. C. C. 129.

(k) 10 Ves. 1.

(b) 1 Ves. sen. 1; S. C. 3 Atk. 419.

(e) 1 Swanst. 211.

(h) 1 Ves. sen. 519.

(l) 1 Swanst. 217.

(c) 10 Ves. 1.

(f) 7 Bro. P. C. 461.

(i) 1 Cox, 188.

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that."(a) It has been argued, however, that, though this is the rule as to a gross sum, yet the case of a covenant to pay an annuity stands upon different grounds, and is governed by a different principle. Upon this point, *Couch v. Stratton* is relied upon. I cannot understand why the rule, which is applied in the case of a gross sum, should not also be applicable to an annuity.

July 10th.—VICE-CHANCELLOR:—Taking *Blandy v. Widmore* and *Lee v. D'Aranda* as binding authorities, and taking the principle of those decisions to be such as is stated by Lord Eldon in *Garthshore v. Chalie*, and by Sir Thomas Plumer in *Goldsmid v. Goldsmid*, I should (if *Couch v. Stratton* were out of the way) conclude that intestacy was a performance of the contract as well in the case of an annuity as in the case of a gross sum of money.

The relation between the parties exists in this case, by reference to which a very singular construction is given in this Court to a contract, the language of which would otherwise have no such effect; and in the case of the annuity, as in the other case, the effect of the intestacy is to put the annuitant in that position with respect to her demand against the estate of the intestate, as, by the terms of the contract, it ought to be in, at the moment when the obligation of the husband actually to perform *the contract arises, that is to say, at his death. But [*531] then the question arises, is not *Couch v. Stratton* an authority the other way? In that case, *Blandy v. Widmore* and *Lee v. D'Aranda* were both cited, and the case was argued by counsel of no common eminence. In that case it seems to have been admitted, and the judgment proceeded on the assumption, that the rule adopted by the Court, in the case of a covenant to pay a gross sum, did not apply to the case of an annuity. Lord Eldon afterwards gave great consideration to the case, and did not express any dissatisfaction with that judgment. I must follow the authority of *Couch v. Stratton*, which, if it has not

 1847.—*Roch v. Callen*.

settled the law, can only be altered by the Lord Chancellor. I treat the case as one in which performance and not satisfaction is to be shown.

ROCH v. CALLEN.*

1847: 20th and 22nd December. 1848: 12th January; 9th February.

A bequest by the will of the testatrix of an annuity to her "servant," E. H., and a bequest by a codicil three years afterwards, of an annuity of the same amount to her "servant," E. H.—*Held* to be cumulative, the word servant not expressing the motive, but being descriptive only.

Notwithstanding the principal question in the suit be the right of the plaintiffs to two annuities, one of which only has been paid, the defendant, on a decree being made for the arrears of the unpaid annuity, cannot set up the Statute of Limitations as limiting the period of the account, if the benefit of the statute be not claimed upon the pleadings.

An annuity given by a will, forming no charge upon land, but being personal only, is not within the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 42.

An executor, in a suit for the arrears of an annuity under a will, disputing the title of the plaintiff to the annuity as a question of law, but admitting assets sufficient to pay funeral and testamentary expenses and legacies, may be decreed to pay the costs of the suit in addition to the arrears, and is not entitled to a decree for an account of the assets prior to any decree being made for costs.

SARAH CHILD, by her will, dated in February, 1828, bequeathed as follows: "I give and bequeath unto my
 [*582] *daughter-in-law, Mrs. Emma Child, all my wearing-apparel, or so much as she shall think proper to select; and such part thereof as she shall not think worth her acceptance, I give and bequeath the same to my servant girl, Elizabeth Hughes. I also give and bequeath unto the said Elizabeth Hughes the sum of 20*l*. a year, to be paid to her by my executor hereinafter named, immediately after my decease." The testatrix then gave the residue of her personal estate to her friend, Charles Poyer Callen, upon trust for sale, and to invest the sur-

* See note, p. 12.

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plus proceeds, after payment of her debts, funeral and testamentary expenses, and the legacies given by the will, or which the testatrix might thereafter give by any codicil thereto, upon trusts therein mentioned, for the benefit of her grandson; and the testatrix appointed the said Charles Poyer Callen her executor. In March, 1881, the testatrix made a codicil to her will, in the following words:—"I bequeath to my servant, Elizabeth Hughes, twenty pounds per annum, for her natural life." The testatrix afterwards made two other codicils to her will, both of which contained bequests to her said grandson.

The testatrix died in 1882. Elizabeth Hughes, the annuitant under her will, intermarried with William Roch, in the lifetime of the testatrix. The executor paid to William Roch and his wife one annuity of 20*l.*, but refused to pay them more.

William Roch and Elizabeth his wife filed their bill, in 1847, for a declaration of their right to the second annuity, an account of the arrears, and payment of the annuity out of the assets of the testatrix. The executor, by his answer, submitted that the plaintiffs were entitled to one annuity only, but admitted assets more than sufficient to satisfy the debts, and funeral and testamentary *expenses and legacies of the testatrix. [*588] The question was, whether the gifts of the two annuities were cumulative, or whether the latter was substituted for the former.

Mr. *Campbell* and Mr. *R. W. Moore*, for the plaintiffs, cited *Hurst v. Beach*,^(a) *Suisse v. Lord Lowther*,^(b) *Lee v. Pain*,^(c) and argued that the gifts of the two annuities were cumulative.

Mr. *Rolt* and Mr. *Terrell*, for the defendant, argued that the latter gift was in substitution for the former.

Dec. 22nd.—VICE-CHANCELLOR:—There is, in this case, an interval of three years between the date of the gift by the will and that by the codicil. The testatrix, no doubt, intended that

(a) 5 Madd. 351.

(b) 2 Hare, 424.

(c) 4 Hare, 201.

 1847.—*Roch v. Callen*.

the second gift should take effect; but the question is, whether it is to take effect in addition to, or be substituted for the first.[1] The rule laid down by Sir John Leach, in *Hurst v. Beach*,^(a) is certainly technical and artificial: it is, that, where legacies are given by two different instruments, it is intended, *prima facie*, that each shall take effect; but that where, in both instruments, the amount is the same, and the same motive is assigned, there a Court of Equity raises a presumption against a double gift, which, however, is a presumption that may be rebutted by evidence. In this case there is no evidence to affect the question, which must stand, therefore, entirely upon the words of the will. The amount is the same in both gifts, and in both there are the words "my servant." Am I to take these words as [*534] *words of description, or as expressive of the motive of the gift? I think they can only be taken as words of description, and that, therefore, both gifts must take effect. The plaintiffs must have their costs.

On the minutes of the decree two questions were raised: first, to what period the account of the arrears should be carried back; secondly, whether the admission of assets extended to the costs of the suit, or whether, before a decree could be made for payment of the costs, there must not be an account taken of the assets.

1848: *Jan 12th*.—Mr. *Campbell*, for the plaintiffs, contended, that the account of the arrears of the annuity should be carried back to the time it first became payable. After the death of the testatrix, the executor was bound, in the execution of his trust, to pay the annuity. There was no Statute of Limitations which interposed as a bar. It was not a charge upon land, as in *Fran-*

(a) 5 Madd. 351.

[1] For cases in which legacies by different instruments have been held accumulative, see *Windham v. Windham*, Finch, 267; *Cliffe v. Gibbons*, 2 Ld. Raym. 1324; *Pit v. Pidgeon*, Ch. Ca. 301; *Masters v. Masters*, 1 P. Wm. 423; *Fby v. Foy*, 1 Cox, 163; *Wright v. Englefield*, Ambler, 468; *Hooley v. Hatton*, 1 Bro. C. C. 390; *Curry v. Pile*, 2 Bro. Ch. C. 225; *Hodges v. Peacock*, 3 Ves. Jr. 735; *Benyon v. Benyon*, 17 Ves. 34.

1847.—Rooh v. Callen.

cis v. Grover, (a) nor was it within the stat. 3 & 4 Will. 4, c. 27, s. 42, nor had sect. 40 of the same statute any application to the case. Even if the Statute of Limitations had been a bar to the plaintiffs' claim to any part of the arrears, it was not open to the defendant in this case, for the benefit of the statute had not been claimed by his answer; and where the defence of the statute is not raised upon the pleadings, it cannot be set up at the hearing: Lord Redesdale, Tr. Pl. 221, 3rd ed., 273, 4th ed.; *Prince v. Heylin*, (b) 2 Wms. Saund. 62, n. (6.) The admission of assets in the answer subjected the defendant to the decree, as well for costs as for the annuity: *Philanthropic Society v. Hobson*, (c)

*Mr. Terrell, for the defendant, argued, that section [*535] 42 of the stat. 3 & 4 Will. 4, c. 27, limited the right of the plaintiffs to the arrears of the annuity for six years before the filing of the bill; and that, in the form of this suit, it was not necessary, in order to be protected by this defence, that the defendant should claim the benefit of the statute by his answer. The only issue upon the pleadings was, whether the plaintiffs were entitled to two annuities or to one only. There was no issue joined upon the amount due: that was a question of account which could only arise when the question of right had been determined. It was now, when the account came to be directed, the proper time to advert to the statute as expressing the limit to which the account should extend. On demurrer, although no mention was made of the Statute of Limitations on the pleadings, yet the defendant might avail himself of the statute as showing that the plaintiff had no title.

VICE-CHANCELLOR:—It would be obviously improper to permit a defendant, at the hearing of a cause, to insist upon the Statute of Limitations, if he has not set up that defence upon the pleadings. If the statute be pleaded, the plaintiff may be able to show circumstances taking the case out of the statute, which he cannot be expected to do if the objection be not taken. Is

(a) 5 Hare, 39.

(b) 1 Atk. 493.

(c) 2 Myl. & K. 357.

 1848.—Robertson v. Southgate.

the Court, in such a case, to refer it to the Master to inquire whether the statute ought to be allowed as a bar to the claim, before the decree is made? With regard to the case of a demurrer, the distinction is, that the decision upon the demurrer does not conclude the right. It merely determines the law applicable to a certain state of facts, which may be varied by the evidence, if the claim be further prosecuted, after the demurrer is disposed of.

The Statute of Limitations does not, however, apply in this case. This is not a charge upon land, within the 42nd section. (a) The parties, moreover, stand in the situation of trustee and cestui que trust, in which case the Lord Chancellor, in *Phillipo v. Munnings*, (b) held, that the statute did not affect the case. It is not, however, necessary to resort to that principal; for this is a mere personal annuity, not within the only clause of the statute under which the defendant could claim any benefit.

 ROBERTSON v. SOUTHGATE.*

1847: 20th, 21st, and 22nd, December. 1848: 12th January.

A joint fiat in bankruptcy was issued against two partners, pending a suit by one of them against the other and a third person who had previously retired from the business, to set aside the partnership agreement on the ground of fraud and misrepresentation on the part of both defendants, and for re-payment of the moneys which the plaintiff had brought into the concern under that agreement. The assignees obtained leave from the Court of Review to prosecute the suit against the retired partner, and they proceeded by supplemental bill, in which the creditors' assignees were plaintiffs and the official assignee and the retired partner were defendants:—*Held*, that the creditors' assignees, who represented not only the original plaintiff on whose behalf relief was sought, but also the bankrupt partner who was an original defendant against whom relief was sought, could not sustain the suit against the retired partner.

Semble, that, in such a case, the suit might have been prosecuted by assignees appointed to represent the separate estate of the plaintiff in the original suit.

Whether if it had appeared in evidence in the suit, that the defendant the retired

 (a) 3 & 4 Will. 4, c. 27.

(b) 2 Myl. & Cr. 309.

* See note, p. 12.

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partner, was alone, or otherwise, answerable for the fraud, the Court could, in such a case, have made a conditional decree, imposing terms upon the plaintiffs, as representing the bankrupt, who was originally charged as defendant, *quære*.

VICE-CHANCELLOR :—In January, 1842, and thenceforth down to September, 1842, James Webb Southgate and Henry Southgate, father and son, were partners as library and book auctioneers, *in Fleet-street, under the firm of Southgate [*537] & Son. On the 6th of September, 1842, on which day William Millar Robertson, the plaintiff in the original suit, attained his age of twenty-one years, James Webb Southgate retired from the partnership; and, in pursuance of an agreement, made in the preceding month of April, 1842, and dated the 20th of April 1842, varied by other articles, dated September, 1842, a new partnership was commenced between Henry Southgate and the plaintiff, Robertson, for fourteen years. The affairs of this new partnership were unprosperous; and, on the 16th of December, 1843, Robertson filed his original bill against the two Southgates. The bill, as it was afterwards amended, alleges that the plaintiff was induced to enter into the new partnership by certain false and fraudulent representations of the two Southgates, or of Henry Southgate in concert with James Webb Southgate, respecting the affairs of the old partnership. The bill prays that the agreement of the 20th of April, 1842, might be declared fraudulent and void, and that, as between the plaintiff and the two Southgates, it might be declared that no partnership had ever existed between the plaintiff and Henry Southgate, and for the payment to the plaintiff of moneys of which, according to the allegations in the bill, he had been defrauded.

The defendants appeared to the bill. But, before either defendants had answered, and on the 4th of January, 1844, a fiat in bankruptcy, issued against the plaintiff and Henry Southgate, under which they were duly declared bankrupts; and, on the 23rd of January, 1834, Harmer and Woodman, the plaintiffs in the supplemental bill, were duly appointed creditors' assignees, and the defendant Turquand official assignee, of the estate and effects of the bankrupts.

*By an order of the Court of Review, of the 11th of [*538]

1848.—*Robertson v. Southgate*.

June, 1845, liberty was given to the assignees to prosecute the suit of *Robertson v. Southgate*; and in March, 1846, a supplemental suit was instituted, in which the creditors' assignees are the plaintiffs and James Webb Southgate and Mr. Turquand, the official assignee, are the defendants.^(a) The supplemental bill is purely formal. It states the institution and pendency of the suit of *Robertson v. Southgate*, the bankruptcy, the appointment of assignees, the order of the 11th of June, 1845, and prays that the plaintiffs in the supplemental suit may have the benefit of the proceedings in the original suit, and the same relief against James Webb Southgate as if no bankruptcy had occurred. The bill was amended, under an order of the 7th of November, 1846. On the 20th of March, 1846, James Webb Southgate filed his answer to the amended bill; and on the 20th of August, 1846, he filed his answer to the supplemental bill. Evidence was gone into, and the cause was heard on the 20th, 21st, and 22nd of December, 1847.

On the part of the defendant James Webb Southgate, two grounds of defence were taken: first, on the frame of the suit; and, secondly, on the merits. If the former be decided in the plaintiffs' favor, it will not be necessary that I should give any opinion on the second; but, having been requested by both parties to express my opinion upon both the above points, I have thought it right to consider the whole case.

In order to explain the view I take of the bill, it is necessary only that I should state generally that the defendant James Webb Southgate, amongst other grounds of defence, denies [*539] having personally made any *misrepresentation whatever respecting the affairs of the old partnership. Indeed, he denies having made any representation whatever on the subject. To this the reply is, that misrepresentations were made by Henry Southgate; and that Henry Southgate, if not expressly authorized by James Webb Southgate to make them, was in law his agent in the treaty for the retirement of James Webb Southgate from the old partnership, and the formation of the

(a) See *Robertson v. Southgate*, 5 Hare, 223.

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new partnership between Robertson and Henry Southgate, and, consequently, that James Webb Southgate civilly, if not morally, is liable to Robertson or his estate for any injury he may have sustained by the misrepresentations of Henry Southgate.

Now, the moment the case was so far opened as to enable me to understand the bearing of its different points upon each other, it struck me that the frame of the suit did or might raise a great difficulty in the way of the plaintiffs in the supplemental suit, admitting for argument's sake, that Robertson might, in the original suit, have been entitled to relief against both the Southgates, so and in such manner that Henry Southgate, as between himself and James Webb Southgate, was liable for the whole or part of the damage. The plaintiffs in the supplemental suit, being the assignees of both bankrupts, represent Henry Southgate for all purposes, whether for claim or liability; unless that be so, Henry Southgate is not a party, and the suit cannot proceed. Henry Southgate, therefore, not being represented upon the record otherwise than by the joint assignees of Robertson and Henry Southgate, is a co-plaintiff with Robertson. He is a co-plaintiff with Robertson the injured party, adopting the statements in the original bill, that by the misrepresentations of himself and James Webb Southgate a fraud was committed upon Robertson, in respect of which he is entitled to *relief against himself or his estate. This, in [*540] the most favorable way of putting it, creates a technical difficulty in the plaintiff's way. And, if the statement of James Webb Southgate be true, that he personally made no representations, or none that were untrue, relating to the affairs of the old partnership; and that, if any misrepresentations were made by Henry Southgate, they were made without his knowledge or privity—if, I say, that suggestion be true, the objection to the frame of the bill becomes one of more difficulty and substance; for, upon that hypothesis, Henry Southgate would, as between himself and James Webb Southgate, be the party ultimately liable, however, as between Robertson and the two Southgates, Robertson obtaining a decree against the two, might have taken out execution against James Webb Southgate alone. If no

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bankruptcy had occurred, Henry Southgate could not, in the case I have supposed, have sued as plaintiff jointly with Robertson against James Webb Southgate. At least, if he could do so, in the case of a fraud practised upon Robertson by himself and James Webb Southgate, jointly, it would be upon the terms of contributing his due proportion of the loss sustained by Robertson. But if the case be, that, as between himself and James Webb Southgate, he was the only party concerned in the fraud, which as between himself and James Webb Southgate, would make him a wrongdoer against James Webb Southgate as well as against Robertson, he would as between himself and James Webb Southgate, be bound to make good the whole loss sustained by Robertson. The same reasoning would apply if Henry Southgate had remained solvent, and Robertson only had become bankrupt; and the same, I conceive, if there had been separate fiats against Henry Southgate and Robertson, and separate sets of assignees: for, to whatever extent Henry Southgate, if solvent, would, as between himself and James Webb Southgate have been bound to make restitution to

Robertson for damage sustained by the fraud of Henry Southgate, to the same extent must his assignees in bankruptcy be barred from suing James Webb Southgate, except upon terms of making contribution to the extent of such liability. This, at least; is the most favorable way of putting the case for the assignees:

The utmost I could do would be to make a conditional decree upon the assignees, as representatives of Henry Southgate, *i. e.* they paying so much as may be found due from his estate in respect of the loss sustained by his fraudulent representations, and which in effect is the same thing as charging James Webb Southgate with that part of the loss only with which, as between himself and Henry Southgate, he ought to be charged; and that would be nothing, if, as between himself and James Webb Southgate, Henry Southgate be ultimately liable for the whole.

I do not, by this course of observation, give any opinion upon the abstract question, whether, in the case of a fraudulent breach of trust by two trustees, a bill for contribution will lie by one charged in execution with the whole, against the other. I say

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only, that if either, for the purpose of undoing his own fraud in favor of the injured party, may sue the other, it must be upon equitable terms, as between the wrongdoers. The course which I should have thought the assignees ought to have taken was, to have different assignees appointed to represent the separate estate of each bankrupt; for, although in proceedings under the bankruptcy, the Court might direct or permit the creditors' assignees to take one side of the argument, and the official assignee the other, and restrain each from taking a formal objection, it has no jurisdiction to restrain James Webb Southgate

*from objecting that Henry Southgate, in this case, is [*542] a plaintiff, and not simply a defendant with himself.

Indeed, the supplemental bill makes no such case, nor is it suggested that the suit was framed under any order of the Court in bankruptcy, directed to the point I am now considering. It was said, indeed, that, upon the occasion of that Court being applied to, to authorize the prosecution of those suits by the assignees, the attention of the learned judge was called to the point, and that he (as Mr. Greene told me) thought there was nothing in it. I have read the short-hand notes of his Honor's judgment, and I do not so understand it. It is true that he did, during part of the discussion, suggest that one section of the assignees might take one side of an argument, and the remaining assignees take another; but he afterwards (as I read the notes) gives the parties a very solemn caution against the possible difficulties in which a suit, framed as this is, might involve them.

I shall now proceed to make some observations upon the actual case to which those observations are to be applied.

[His Honor then stated the pleadings and evidence in the cause, and concluded, that, upon the case then before the Court, the plaintiffs had not made out any case for charging the defendant, James Webb Southgate.]

If, against my opinion, any ground for charging James Webb Southgate should be thought to exist, it appears to me, that, as between Henry Southgate and James Webb Southgate, the

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former was the party ultimately liable; and that I ought not, in a case so circumstanced to deprive James Webb Southgate of any advantage he can derive from the objection taken to the frame of the bill.

[*543] *The case was argued by Mr. *Kenyon Parker* and Mr. *Greene*, for the plaintiffs; Mr. *Romilly* and Mr. *Hallett*, for the defendant, James Webb Southgate; and Mr. *Tripp*, for the official assignee.

BELL v. ALEXANDER.

1846: December 1st and 12th. 1847: July 2nd and 8th.

A deed, dated the 2nd of April, 1813, made between a mother and her two illegitimate children, recited, that, by a prior deed of the 28th of November, 1804, a trust fund had been appointed by the mother to one of such children, subject to a power of revocation, which was thereby expressed to be exercised, as to one moiety, in favor of the other child. The recited deed of the 28th of November, 1804, was not produced, and no evidence of it (beyond such recital) was given. The deed of the 2nd of April, 1813, was in another suit declared not to be a valid appointment, being in favor of persons whom the Court held not to be objects of the power reserved in the recited deed of the 28th of November, 1804; and in a suit by other persons claiming under legitimate children, and appointees of the same mother by an instrument later in date than that of April, 1813, the Court decreed the transfer of the fund to the parties representing such legitimate children, and refused to direct any inquiry as to the recited appointment of the 28th of November, 1804.

As to the effect which would have been given to the recital of the deed of the 28th of November, 1804, if the title of the plaintiff in the last suit had been founded upon, or had been derived under or through, the deed of the 2nd of April, 1813, which recited that of the 28th of November, 1804, *quære*.

The Attorney-general does not, as a party in the cause, sufficiently represent the estate of an illegitimate person who died intestate, so as to enable the Court to dispense with a legal personal representative of such person, duly constituted in the Ecclesiastical Court, as a party.

THE plaintiffs were the assignees of one-third of the fund of 4200*l.* Consols, which was the subject of the suit of *Dover v.*

1846.—Bell v. Alexander.

Alexander (a). The bill stated the deed of the 24th of November, 1804, whereby Elizabeth Whatton acquired a life-interest in the stock in question, with a general power of appointment; and it also stated a deed-poll of the 29th of May, 1813,(b) whereby Elizabeth Whatton appointed the fund (subject to her own life-estate) to her three legitimate sons, John, William, and George. The plaintiffs claimed the share of William, by assignment from him.

The trustee of the fund declined to transfer it without *the direction of the Court, in consequence of the [*544] notice he had received of the recital which appeared in a deed of the 2nd of April, 1813, that Elizabeth Whatton had, by an indenture dated the 28th of November, 1804,(c) exercised her general power of appointment in favor of her illegitimate son, Charles Watkinson Arkinstall. Charles Watkinson Arkinstall was dead, intestate and unmarried. The Attorney-General was made a defendant, as claiming the fund on behalf of the Crown, by virtue of the alleged appointment of the 28th of November, 1804.

Mr. *Wray* appeared for the Attorney-General; and Mr. *Willcock*, Mr. *Baily*, and Mr. *W. Morris*, for different defendants.

It was objected, that a personal representative of Charles Watkinson Arkinstall ought to be before the Court.

Mr. *Romilly* and Mr. *Blunt*, for the plaintiffs, argued that the alleged interest of the deceased illegitimate son was sufficiently represented for the purpose of the suit by the Attorney-General. The plaintiffs denied the existence of any such instrument as the pretended appointment of the 28th of November, 1804; but, even if any evidence of such an instrument were produced, the whole interest of the appointee was now vested in the Crown. No letters of administration would be granted, except to a

(a) 2 Hare, 275.

(b) This deed is not mentioned in *Dover v. Alexander*, ubi sup.

(c) 2 Hare, 276, n. (a)

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nominee of the Crown; and any grant of the estate to another party would be made by the Crown, subject to the debts of the intestate.

VICE-CHANCELLOR.—How is the Court to know in [*545] *this suit that Charles Watkinson Arkinstall was illegitimate? Is there any case in which the Court has determined a question affecting the personal estate of a deceased person, dispensing with the presence of a representative of that estate, constituted by the Ecclesiastical Court in the ordinary way, on the ground that such person was illegitimate, and his estate claimed by the Crown?

Mr. Romilly said, that in this cause the plaintiffs stated, and all the defendants admitted, the illegitimacy of Charles Watkinson Arkinstall. On the point whether the question with reference to the alleged appointment could be determined in the absence of the legal personal representative, the cases of *Jones v. Goodchild*, (a) *Middleton v. Spicer*, (b) *Megit v. Johnson*, (c) and *Rutherford v. Maule*, (d) were cited.

The VICE-CHANCELLOR held, that a legal personal representative of Charles Watkinson Arkinstall was a necessary party.

1847: *July 2nd* and *8th*.—John George Bayley, the administrator ad litem of the estate of Charles Watkinson Arkinstall, was made a defendant, by amendment.

Evidence was given, on behalf of the defendants claiming under the alleged deed of the 28th of November, 1804, [*546] of ineffectual searches for that instrument. *The deed of the 2nd of April, 1813, was produced, and put in evidence as an old deed, without further proof.

Mr. Romilly and Mr. Blunt, for the plaintiffs.

(a) 3 P. Wms. 33,

(b) 1 Bro. C. C. 201.

(c) 2 Dough. 542.

(d) 4 Hagg. Ec. Rep. 213.

1847.—*Bell v. Alexander.*

Mr. *Bagshaw*, Mr. *Willcock*, Mr. *Glasse*, and Mr. *White* for other parties.

Mr. *Lloyd*, for the administrator ad litem of Charles Watkinson Arkinstall, submitted, that the recital of the appointment of the 28th of November, 1804, in the deed of the 2nd of April, 1813, ought to be taken, either, at this distance of time, as evidence of the appointment, or at least as a sufficient ground for directing an inquiry of the fact whether such an appointment had been actually made: *Ward v. Garmons*,^(a) *Bringloe v. Goodson*.^(b) The decision of the Court in *Dover v. Alexander*,^(c) that the after-born illegitimate child cannot take under the deed of the 2nd of April, 1813, casts the entire fund upon the appointee of the 28th of November, 1804, inasmuch as it invalidates the revocation attempted to be made by the later instrument.

Mr. *Wray*, for the Attorney-General.

VICE-CHANCELLOR:—Under the trusts of a settlement, dated the 24th of November, 1804, a sum of 4200*l.* Consols stood limited, after the death of Elizabeth Whatton, in trust for her appointees by deed or will; and, in default of any appointment *by her, in trust for her sole and separate [*547] use. Elizabeth Whatton, on the 29th of May, 1813, by a deed-poll of that date, duly executed and attested in manner required by the settlement of the 24th of November, 1804, for the appointment of the Consols therein mentioned, appointed the same, immediately after her decease, to her three sons, John, William, and George. Elizabeth Whatton has since died, and her three sons survived her. The plaintiffs are derivatively the purchasers of the one-third share of William, and the object of the suit is to obtain the distribution of the fund between the plaintiffs and the parties entitled to the remaining two-thirds, under John and George, the other appointees, by the deed of the 29th of May, 1813. The right of the plaintiffs and of those

(a) 17 Ves. 134.

(b) 5 Bing. N. C. 739.

(c) 2 Hare, 275.

1847.—Bell v. Alexander.

other persons is decided, subject to a claim set up by the defendant John George Bayley, who is the administrator of one Charles Watkinson Arkinstall, in whose right Bayley claims to be interested in the fund in dispute, under an appointment by deed, dated the 28th of November, 1804, alleged to have been executed by Elizabeth Whatton in his favor.

The deed, or alleged deed, of the 28th of November, 1804, is not produced, nor has any evidence been gone into which sufficiently explains why it is not produced; and the only evidence which has been tendered to prove the existence of such a deed is a recital in a deed of the 2nd of April, 1813, executed by Elizabeth Whatton.

At the close of the argument I was impressed with the idea that the deed of the 2nd of April, 1813, was in some way connected with the title of the plaintiffs in this suit, so that they could not make out their title without drawing under my notice the deed of the 2nd of April, 1813. I do not, however, after reading the papers, understand that such is the case. The [*548] plaintiffs *make out their title wholly under the settlement of the 28th of November, 1804, the appointment of the 29th of May, 1813, and the several assignments from William Whatton, the appointee; and the deed of the 2nd of April, 1813, is first introduced by the defendant Bayley for the sake of the recital it contains of a previous deed of the 28th of November, 1804, upon which Bayley relies.

I am not called upon to express any opinion of the way in which the case must have been dealt with if the deed of the 2nd of April, 1813, had been the plaintiffs' evidence, or part of their case; but that not being so, (and the recital not proving the deed,) the question is, whether this is a case for allowing the defendant Bayley to perfect by further proceedings the case he ought to have proved at the hearing.

In considering this I have felt bound to refer to, and consider the proceedings in, *Dover v. Alexander*, which are noticed in, and made part of, the pleadings in this cause, and were argued upon at the bar. Those proceedings appear to me to show, conclusively, that the parties claiming under Charles Watkinson Ar-

1849.—Wisden v. Wisden.

kininstall had the most distinct notice of the case they would be bound to establish at the hearing of this cause, in order to entitle themselves to relief; and I cannot but conclude they have not gone into the necessary evidence, only because they have none to adduce. But whether the absence of any such evidence has or has not arisen from that cause, it is not a case in which I can see any ground for affording the defendant the indulgence which is asked.

*WISDEN v. WISDEN.

[*549]

1849: January 18th and 25th.

The solicitor of the plaintiffs in the cause was served with a subpoena to attend and be examined before commissioners as a witness for the defendants, and he thereupon attended and delivered to the commissioners a written refusal to be examined, on the ground of his being professionally employed by the plaintiffs: *Held*, that such document was not properly returned by the commissioners, and ought not to have been set down as a demurrer.

That a witness who has attended to be examined, in pursuance of a subpoena, cannot then refuse to be examined, on the ground of irregularity in the service of the subpoena.

That it is not necessary to serve the other parties in the cause with a notice of motion that a witness be ordered to attend and be examined, though the reason assigned by the witness for his refusal to be examined was, that he was professionally concerned as solicitor for such other parties.

A COMMISSION was issued to examine witnesses on behalf of the defendants; and Mr. John Dunford, a solicitor, was served with a subpoena ad testificandum and duces tecum, in obedience to which he attended at the Old Ship Tavern, at Brighton, on the 13th December, 1848. The witness there saw one of the commissioners, and, after delivering to him the following letter addressed to the commissioners, left the place without having been sworn:—

“Gentlemen,—I beg to inform you that I am the solicitor for the above-named plaintiffs in this cause, and I claim my protec-

1849.—Widen v. Widen.

tion from being examined as a witness on the part of the defendants, on the ground of professional confidence; and even if I were disposed, my clients will not allow me to make the disclosure.

“As witness my hand this 18th of December, 1848.

“Yours, &c.,

“JOHN DUNFORD.”

The commissioners, in their return, treated the letter as a demurrer by the witness; and it was accordingly set down for argument as a demurrer.

Mr. *C. P. Cooper* and Mr. *Glasse*, for one defendant; and Mr. *Simpson*, for another defendant.

The VICE-CHANCELLOR said that the letter was not [*550] *a demurrer; a mere refusal of a witness to be sworn in that manner could not be treated as a demurrer.

The defendants then severally moved that the witness might be ordered to attend before the examiner in London, to be examined upon interrogatories to be exhibited on behalf of the defendants, and to pay the costs.

Mr. *C. P. Cooper*, Mr. *Glasse*, and Mr. *Simpson*, for the several motions.

Mr. *Shebbeare*, for the witness Dunford, objected, first, that the plaintiffs in the case ought to have been served with the notice of motion; secondly, that the subpoena had not been served upon the witness in due time, and that the service was invalid according to sect. 1 of the General Order XVI. of May, 1845; and, thirdly, that professional confidence was a ground of protection upon which the witness was justified in insisting.

The VICE-CHANCELLOR held, that it was not necessary to serve the plaintiffs with notice of the motion;(a) and that, having

(a) See, on this point, *Tippins v. Coates*, *supra*, pp. 23, 24.

1849.—Wیدن v. Wیدن.

attended the commissioners in obedience to the subpoena, the witness could not then object to be examined, on the ground of irregularity in the service. His Honor also (guarding himself against being understood to express any opinion as to the extent to which the witness was or was not protected from examination by his clients' privilege, and which, as the privilege *of the client, it was the duty of the witness to [*551] insist upon) held, that the reason assigned by the witness for refusing to be examined generally was insufficient. If it were allowed to prevail, a party might, by employing a solicitor who was acquainted with facts necessary to be proved in a cause, exclude the opposite party from the benefit of his testimony as to matters to which no privilege could possibly apply. It was incumbent upon the witness to have submitted to be sworn, and to have heard the interrogatories put to him, and then he might have claimed protection as to those questions to which the privilege applied.

The witness was ordered to attend before the Examiner, to be examined upon interrogatories to be exhibited on behalf of the defendants, at such time as the Examiner should appoint, and to pay the costs of the motions.

1848.—Gaunt v. Johnson.

GAUNT v. JOHNSON.

1848: July 18th.

A witness, who had attended before the Examiner, but had refused to be examined unless he were paid the expenses of some former attendances, ordered, upon motion, to attend and be examined, and to pay the costs of the motion.

THE *Solicitor-General* moved that Mr. Thomas Bruce Wavell might be ordered to attend before Mr. Plumer, the Examiner, on a day named in the notice of motion, or at such other time as the Examiner should appoint, and give his evidence on the matters in question in the cause, or that in default he might stand committed.

The motion was made upon the certificate of the Examiner, that the witness attended before him, on &c., to be examined as a witness in the suit on the part of the defendant Johnson, and that he refused to be sworn unless he was paid the sum of 10*l*.

10*s*. for expenses and loss of time in attendance, on [*552] two occasions, at *Newport, as a witness in the cause.

It appeared by the affidavits, that some small payments had been made to the witness on the occasions referred to, and something more had been tendered, but considerably less than the amount of his demand.

Mr. *Bagshawe*, for the witness, opposed the motion. The Examiner had, upon the statement of the witness, ordered him to retire. He should have overruled the objection; the examination would then have proceeded, and the present motion have been unnecessary. He submitted that no costs should be given.

The VICE-CHANCELLOR made the order for the attendance of the witness, and that he should pay the costs of the motion.

1849.—Cross v. Sprigg.

CROSS v. SPRIGG.

1849: February 17th and 26th; March 9th.

Merely voluntary declarations indicating the intention of a creditor to forgive or release a debt, if they are not evidence of a release at law, do not constitute a release in equity.[1]

Unless there be a consideration, or some equitable ground of distinction, equity in such a case follows the law.

A SUIT for the administration of the estate of the testator, Thomas Cross. A reference was directed to inquire whether the defendant John Gilbert was liable to pay any part of the 1000*l*. appearing, by the report, to be due from him, as surety for William Gilbert, and, if so, to certify the amount due for principal and interest. The Master found that the testator lent William Gilbert 1000*l*. upon his bond, dated the 3rd of December, 1838, for the purpose of establishing him in business, in partnership with another person; that John Gilbert and one West were sureties in the bond, each *for 333*l*. 6*s*. 8*d*. [*553] and interest, with a condition that no proceedings should be taken to enforce payment against John Gilbert and West, until three months' notice should have been given to them, their executors &c.; that in September, 1840, William Gilbert and his partner dissolved their partnership, and their creditors agreed to accept a composition of 11*s*. in the pound on their debts; that the testator agreed to become surety for the payment of such composition, and agreed with William Gilbert to relinquish and give up the bond debt, and all interest that had accrued thereon, and promised him to deliver up the bond to be cancelled, but did not do so, because, as he told William Gilbert, he could not find such bond; that the testator never applied for payment of the principal or interest on the bond, and a short

[1] The Lord Chancellor, on appeal, held, that the transaction between the obligor and obligee amounted to such a contract as would have the effect of giving time to the principal, and that consequently the sureties in the bond were discharged. *Cross v. Sprigg*, 2 Hall & T. 233.

1849.—Cross v. Sprigg.

time before his death he gave William Gilbert 60*l*. and told him that such sum and all other moneys which he had received from him, (the testator,) and had not repaid, were to be considered as gifts. And the Master found, that, under the circumstances aforesaid, the defendant John Gilbert was not liable to pay any part of the said 1000*l*. and interest.

Several exceptions were taken to this report.^(a)

The only evidence with respect to the bond, except [*554] the *affidavits of the said William and John Gilbert, was the affidavit of a clerk of the firm of Sewell & Cross, in which the testator was a partner, who deposed that the testator, Cross, at several different times before his decease, told the deponent that he never intended William Gilbert to pay the amount of the bond, as he (the testator) always considered it a gift, or expressed himself on several different occasions before his decease in words to that effect; that, in the course of a conversation which was held between the deponent and the defendant Harriet Clara Sprigg, the widow and administratrix, relative to the affairs of the said testator, shortly after his death, the said Harriet Clara Sprigg told the deponent, that her late husband, the testator, said to her, while he was ill in bed, that William (meaning William Gilbert) was not to be called on for the money in respect of the bond, meaning, as the deponent believed the money secured by the bond of the 3rd of December, 1838; and that, for the reasons aforesaid, the deponent believed, that the testator had wholly relinquished or given up the bond debt, before his decease, to the said William Gilbert. The deponent said, that the testator, for many years before his death, kept a private ledger, in which were contained entries relative to his

(a) Master Farrer, to whom the case was referred, delivered a written note of his reasons for overruling the objections to the report, in which he thus stated the grounds of his conclusion: "Being of opinion that the testator did promise and agree to and with William Gilbert to give up the bond debt, I consider that that promise and agreement necessarily involves giving time to William Gilbert, although the promise or agreement might not be valid in a legal point of view. I overrule the objection upon the ground, that the acts and conduct of the testator necessarily gave time to the principal." See, on this point, the argument in *Mackintosh v. Wyatt*, 3 Hare, 562.

1849.—Cross v. Sprigg.

property and the debts due to him, and that among such debts there was included the said bond debt; but the deponent believed that such bond debt was erased from the said private ledger by the testator some time before his death. The book was not produced.

The *Solicitor-General* and Mr. *Glasse*, in support of the exceptions.

Mr. *Teed* and Mr. *Hallett*, in support of the Master's report.

*VICE-CHANCELLOR:—The question raised by the ex- [*555] ceptions in this case was, whether William Gilbert, the obligor in a bond for 1000*l.*, was liable for the amount of such bond to the defendant Harriet Clara Sprigg, the widow and administratrix of Cross, the obligee in the bond and the testator in the cause; and this general question resolved itself into two—first, whether the testator's declarations justified the conclusion, that he had abandoned all intention of recovering upon the bond, and intended that the obligor should no longer be liable upon it; and, secondly, if that were answered in the affirmative, what were the consequences in respect to the liability of the obligor?

Assuming the first question to be answered in the affirmative, I had no hesitation in holding, at the close of the argument, that the debt remained at law, and to that opinion I adhere. I was also of opinion, that, if the debt remained at law, it must remain in equity, unless some special grounds were laid for a different conclusion; and I was of opinion, that a mere intention on the part of the testator, which he might at any time have changed, not to sue upon the bond, would not give such an equity. But, as the case of *Flower v. Marten*(a) appeared to have escaped the recollection of counsel, I requested that the exceptions might be spoken to, by one counsel on a side, with reference to some of the principles which the Lord Chancellor laid down in that case, and upon which the cases there referred to were decided. This

(a) 2 Myl. & Cr. 459.

 1849.—Cross v. Sprigg.

was accordingly done, and I have now to state the grounds upon which I have come to the conclusion, that the obligor, having, in this case, no defence at law, has none in equity.

[*556] *In *Welkett v. Raby*,^(a) Raby was indebted to the testator, Mr. Piggott, on a bond for securing 335*l.* 5*s.* Mr. Piggott made his will, and appointed the appellant, Mary, his executrix and residuary legatee, and died about two years afterwards. In his last sickness, and a few days only before his death, he said to the appellant, Mary, "I have Raby's bond, which I keep; I don't deliver it up, for I may live to want it more than he; but when I die, he shall have it; he shall not be asked or troubled for it." After the death of the testator, Raby asked Mary to "make him a present of the bond, but did not pretend to have any right to it; her answer was, "You may be easy—it is safe in my hands;" she afterwards added, "If I marry, I will deliver the bond to you the night before." Mary having afterwards put the bond in suit, Lord Macclesfield, upon Raby's bill, ordered the bond to be cancelled, and the House of Lords confirmed that decree. The circumstances of that case bring it within the principle examined by the Vice-Chancellor in *Padmore v. Gunning*,^(b) and to that principle the decision in *Welkett v. Raby* is referred by the Lord Chancellor in the case of *Byrn v. Godfrey*. It would have been a fraud in the residuary legatee to enforce the bond. The decision did not proceed upon the ground of release.

Richards v. Symes^(c) decided that a creditor, whose debt was secured by a bond and mortgage, released the debt by delivering up the bond and mortgage with the declared intention of releasing the debt; but that, I apprehend, was considered by Lord Hardwicke as a legal and not merely as an equitable discharge, and, moreover, was a different thing from the mere declaration of intention to forgive a debt. Lord Hardwicke seemed,

[*557] *first, to be of opinion, that it was an equity which could only be enforced if the creditor was plaintiff; but he afterwards said it was otherwise, for that the law was with the debtor.

(a) 2 Bro. P. C. 386, Toml. ed.

(b) 7 Sim. 644.

(c) 2 Eq. Ca. Ab. 617.

1849 —Cross v. Sprigg.

In *Aston v. Pye*, (a) cited in a note on *Eden v. Smyth*, and commented upon by the Lord Chancellor in *Byrn v. Godfrey* and in *Eden v. Smyth*, the following entry was made in the books of the testator, the payee of a note: "Pye pays no interest, nor shall I ever take the principal unless greatly distressed." The testator died. The case came before Lord Kenyon, at the Rolls, upon the question, whether the debt was subsisting, and Lord Kenyon sent the parties to law. It does not appear that Lord Kenyon, or Lord Loughborough noticing this case, thought that the maker of the note could have any equity, if the law was against him, as it was held to be.

Byrn v. Godfrey (b) is the next case. In that case the testator held a promissory note for 200*l*. He frequently told his executor that he never meant to call for payment of the note, and made a statement to that effect the day before his death. Lord Loughborough said, that the case relied upon was not a release, so that he could say that the debt was gone by the act of the party to whom the money was due; nor was it a legacy; and the bill was dismissed, so far as it prayed that the note might be cancelled. In that case Lord Loughborough referred to *Wekett v. Raby* and *Aston v. Pye*, and the case of *Richard v. Syme* before Lord Hardwicke, to which I have already referred.

The next case is *Eden v. Smyth*. (c) In that case the question was, whether a legatee was entitled to his legacy discharged of a debt he owed the testator. Letters and declarations of the testator were given in evidence, and also *accounts [*558] of the testator, and memoranda in his handwriting; and, upon the evidence, the Court held, that the debt was discharged. The judge who decided this case was the same who decided *Byrn v. Godfrey*, which was cited; and it is not to be assumed, that he intended, in *Eden v. Smyth*, to act upon a different principle from that upon which he decided *Byrn v. Godfrey*. In *Eden v. Smyth* the Lord Chancellor did that which, perhaps, would be considered questionable at the present day: he went into the inquiry, what the testator, at the time of making his will, con-

(a) 5 Ves. 350, n.

(b) 4 Ves. 6.

(c) 5 Ves. 341.

1849.—Cross v. Sprigg.

sidered or intended to consider his fortune as consisting of, as distinguished from what it actually consisted of. But it is unnecessary to rely upon this, for it is manifest that Lord Loughborough's judgment did not proceed upon any distinction between legal and equitable discharges of a debt. His judgment was, that the debt was gone at law.

Reeves v. Brymer(a) is a most important case. Nothing could be more explicit or certain than the intention of the obligee to discharge the obligor. Lord Alvanley thought it a hard case, and desired to find the means of holding the obligor discharged. But he would do nothing, except give the parties leave to proceed at law. *Eden v. Smyth* and *Aston v. Pye* were cited, and Lord Alvanley's observations show that he considered *Eden v. Smyth* as proceeding upon the same grounds as I have done.

Gilbert v. Wetherell(b) is not a very clear case. It was a transaction between father and son. The father had lent the son 10,000*l.* and took his promissory note for it; an account [*559] was afterwards settled between them, *by which it appeared, that more than 9000*l.* was due upon the note. Further transactions took place, by which it was said the son became further indebted to his father. The father, shortly before his death, burned the promissory note in the presence of a witness, saying at the time, "Now Thomas owes me 11,000*l.*" Sir John Leach said, that the circumstances under which the note had been destroyed amounted to an equitable release of the debt, but that the sum of 9000*l.* and upwards, which remained due by the account stated, must be considered as an advancement. None of the preceding cases were cited; and this is, I believe the first case in which the proposition is laid down, (if it be there laid down,) that voluntary transactions on the part of an obligee, which at law are inoperative, create an equity in favor of the debtor to be discharged from his debt. But the case cannot be an authority for any abstract proposition; for Sir John Leach held, that the transaction converted the debt into an advance-

(a) 6 Ves. 516.

(b) 2 S. & S. 254.

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ment. It is impossible to treat that case as not depending upon the relation between the obligor and the obligee.

The only case which has made me doubt my conclusion is that of *Flower v. Marten*,^(a) which contains language on the part of the Lord Chancellor, expressive, it is said, of his opinion, that where a creditor by his conduct shows an intention to abandon his rights as a creditor, and treat the debt as a gift to the debtor, equity will not permit the debt to be enforced. If I understood the case as deciding any such abstract proposition, I should unhesitatingly follow it, but I do not understand that such is the effect of the judgment. *The cases which the [*560] Lord Chancellor adverts to as governing his decisions, are *Wekett v. Raby* and *Eden v. Smyth*, which certainly establishes no such abstract proposition; and the judgment of the Lord Chancellor throughout, by a pointed reference to the peculiar circumstances attending the creation of the debt, and the relation in which the debtor and creditor stood to each other shows that he did not found his judgment upon any such proposition. The case before me is the case of a creditor declaring (not to his debtor) his intention not to sue upon a bond; for I have no evidence of the alleged erasure of the bond in the testator's books, and I do not propose to make that erasure the subject of inquiry, as it would not alter my opinion if it were proved; and if the case rested here, I should hold that the debtor remained liable on his bond.

But it was said, that the defendant Harriet Clara Sprigg admits that she heard the testator say, that the bond was not to be enforced, and that she as residuary legatee for life, is within the principle of *Wekett v. Raby*. The utmost extent to which that observation would carry the case is this, that Harriet Clara Sprigg could not during her life claim the interest of the bond; but that is not the question I have now to decide.

The ground on which I proceed is, that, if in this case obligor has no defence at law, he has none in equity. The legal question may be tried by an action, if he desires it.

(a) 2 My. & Cr. 459.

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*HEPWORTH v. HESLOP.

1849: 22nd, 23rd, and 26th February.

An executor having assets of his testator, either in money or goods, before any bill had been filed for the administration of the estate, applied to a creditor of the testator for a loan of a sum of money equal in amount to the debt; and the creditor accepted the personal security of the executor for the amount, and released his debt against the estate:—*Held*, that the executor having, by such substitution of his own security for that of the estate, discharged the debt, as against the estate, should not be treated as a mere purchaser of the debt of the creditor, and, as such, entitled only to stand in the place of the creditor; but that the executor was entitled to be allowed, in his own discharge, the amount of the debt as a debt of the testator preferred and paid.

On a question in the administration of assets, whether a bond given by a testator to his son for alleged arrears of salary was voluntary or for valuable consideration, the Court, not relying on the admission of the testator, or the examination of the son and executor, in a case where the estate was insolvent, directed an issue on the question, whether the testator, at the time of executing the bond, was indebted to the obligee to the amount thereby secured.

A CREDITOR'S suit. The deceased debtor and testator was Ralph Heslop, a wine merchant; and the defendant John Heslop was his son and executor. The defendant claimed to be allowed, in his discharge, 512*l.* 10*s.* for principal and interest on a bond dated in October, 1841, from the testator to the defendant; 430*l.*, the balance on a bond from the testator to the Reverend James Charnock; and 194*l.* 11*s.* 6*d.*, the balance on a bond from the testator to the Reverend Joseph Mitton.

The bond of the executor himself was stated by his affidavit to have been given by the testator, in consideration of ten years' services of the defendant, as his clerk and traveller, and which, in addition to his maintenance after he had served his father for seven years, and learnt his business, without remuneration, the testator had, in 1831, agreed to give the defendant, but had not paid. A witness also deposed to a conversation in which the testator had adverted to the claim, and proposed to meet it by a legacy. The Master allowed this claim of the executor as a voluntary bond only.

The two bonds from the testator to Mr. Charnock and Mr.

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Mitton had been discharged as against the testator's estate, in the following mannner:—The executor applied to Mr. Charnock for a loan of the 430*l.*, and this loan Mr. Charnock consented to make upon the executor discharging the debt due upon his father's *bond; and the executor accordingly, in [*562] April, 1842, gave Mr. Charnock, in exchange for, and in satisfaction of, the testator's bond, the defendant's own bond for a like principal sum of 430*l.*, and paid him 6*l.* 9*s.* in cash for the interest then due from the testator's estate, and Mr. Charnock then delivered up the testator's bond to the defendant. The defendant had also applied to Mr. Mitton for a loan of 450*l.*, being the same sum which the testator's estate owed to Mr. Mitton upon a bond from the testator for 200*l.*, and a promissory note of the testator and another person for 250*l.*; and Mr. Mitton agreed to lend the defendant the 450*l.* upon the joint and several promissory note of himself and a surety. The joint and several promissory note was accordingly given to Mr. Mitton, in May, 1842, and 9*l.* 18*s.* 6*d.* paid to him in respect of interest then due from the estate; and Mr. Mitton then delivered up to the defendant the said bond of the testator for 200*l.* and the promissory note for 250*l.*

The defendant, by his examination, stated, that he was then personally liable to pay the two sums of 430*l.* and 450*l.* to Mr. Charnock and Mr. Mitton, which they had so lent to him; and that the said transactions were bona fide and subject to no evasion, revocation, or condition; and that the estate of the testator was wholly relieved from the said bond-debts. The bill was not filed until September, 1842.

The Master allowed the two payments of 6*l.* 9*s.* and 9*l.* 18*s.* 6*d.*, and stated his opinion that the defendant ought to be considered as the purchaser of the testator's bonds to Mr. Charnock and Mr. Mitton, and as standing in the place of the obligees, and not as having paid the same. It appeared that the estate was insufficient to pay specialty debts.

*The executor excepted to the report, both as to the [*563] finding that his own bond was voluntary, and that the bonds of Charnock and Mitton were not paid.

Mr. Wood and Mr. Thomas Parker; for the exceptions.

The *Solicitor-General*, and Mr. Willcock, in support of the report, contended, with reference to the bond for 500*l.*, given by the testator to his son, that there was, in fact no evidence to prove that the bond was given for a valuable consideration. There was nothing but the affidavit of the obligee, which, though required by way of precaution, could not be regarded as evidence: *Whitaker v. Wright*.^(a)

With regard to the bonds of Charnock and Mitton, the course adopted of obtaining their discharge simultaneously with the loan to the executor, was a novel device, whereby an executor may exercise his power of preferring creditors of equal degree for his own advantage. He attempts, by this proceeding, to put himself in the position of a person who has done a thing which he has not done; he has not paid the debts of the testator, but has merely given security for them, and claims to be treated as if he had paid them. It is not argued that the two bond-debts have by this means been cancelled; but the argument of the plaintiffs is, that the executor must be treated as a purchaser of these debts, and stand in the same position as the obligee stood, and be paid rateably with the other bond-creditors. The purchase of the debts cannot be regarded as an act done [*564] *by the defendant in his character of executor; it is merely a substitution of one creditor for another.

The VICE-CHANCELLOR inquired whether the executor had assets of the testator in his hands at the time when the transactions as to Charnock's and Mitton's bonds took place. He also observed, that he did not see why the executor might not have had the benefit of the discharge of those bonds at law, under the plea of *plene administravit*.

Upon the question of assets at the time, there was a dispute, and the Master's report did not furnish decisive information.

(a) 2 Hare, 310, 315.

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Mr. Wood referred to the case of *Gillies v. Smither*.(a)

VICE-CHANCELLOR:—The exceptions apply to two points: First, that the Master has treated as voluntary a bond by the testator to the executor for 1000*l.* to secure 500*l.* Secondly, that the Master has refused to allow certain sums as payments in a due course of administration before suit, and has refused to allow such sums, except as debts owing from the estate of the executor to the testator, in competition with other creditors of the testator.

Upon the first point I must (with regret) take the course which I think the Master would have taken if he had had jurisdiction so to do. I cannot overrule the exceptions relating to this point without giving the executor an opportunity of trying in an issue whether *the testator, at the time of execut- [*565] ing the bond, was indebted to the obligee in the amount thereby secured, giving liberty to the judge to indorse any special matter on the *postea*. Nor can I allow the exception without giving the plaintiff the same opportunity of trying the matter by an issue.

Attending to the different effects of a bond for value, and a voluntary bond in the administration of an insolvent estate in this Court, I think the creditors of the testator have thrown upon the obligee the onus of proving the consideration of the bond. The only evidence of this is the admission of the testator. This admission was made when he was laboring under the illness of which he shortly afterwards died. The alleged consideration was ten years' arrears of a salary of 50*l.* a year, which the testator is said to have agreed to pay the obligee for his services as clerk and traveller in the testator's business as a wine merchant. For this alleged debt (as appears by the evidence) the testator intended to have provided by giving his son a legacy, having a preference over other legacies in the will; but from this course he was induced to depart, and to substitute the bond for the intended legacy, under circumstances stated by a witness for the executor.

In directing this issue I do not mean to throw discredit upon

(a) 2 Stark. N. P. C. 528, cited 2 Wms. Executors, 1213.

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the defendant, or the witness who supports his case. I do not doubt that in 1828 or 1831 some treaty took place between the testator and the obligee in the bond, upon the subject of the alleged salary; but the question is, was a contract then made for the payment of that salary, upon which an action could have been maintained by the son against the testator? It appears to me that the cross-examination of the defendant's witness, [*566] relating to what passed between him and *the testator, which terminated in the bond being substituted for the intended legacy, may throw much light upon this question; and in the case of an insolvent estate, I think the creditors are entitled to the opportunity I propose to give them, of trying their rights. It must be remembered, that the obligee derived advantages and emoluments from the testator during the period of his services, besides the salary for which the bond was given, and I cannot assume that the testator was ignorant of the state of his property. The case, as it now stands, in point of evidence is not satisfactory.

Secondly. The exceptions applicable to the second point raise this question. It appears that the executor, who succeeded to the business, stock in trade, and some other effects of the testator, was desirous of retaining in his hands part of the assets of the testator. To effectuate this object, transactions took place between him and certain bond-creditors of the testator, the effect of which, if the transactions are to prevail *modo et forma*, will be to charge the assets in the same way as if the bond-creditors with whom these transactions took place had been paid in full by the executor, in preference to the other bond-creditors of the testator.

The form of the transaction was this: the bond-creditors agreed to lend to the executor the amount of their respective bonds. The executor thereupon bound himself to pay, and gave the creditors security for the amount of their respective debts, and the creditors executed releases in full of all demands against the testator's estate. This was in April and May, 1842, before the suit was instituted.

The executor has insisted, before the Master, that he is entitled to have these transactions considered as payments

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*made by him to the bond-creditors whose debts [*567] have thus been satisfied; that he was not bound to go through the form of paying the debts and receiving back the money, or of delivering goods in satisfaction of the debts, and receiving them back again in order to give validity to the transaction; that he was entitled by law to prefer one creditor to another, and that he has done that, and nothing more, by the transactions before mentioned; and that, in passing his accounts, he is entitled to be allowed the amount of the debts, in the same manner as he would have been allowed the same if he had actually paid them out of cash of the testator.

The Master did not take this view of the case, and disallowed the claim as made by the executor, but has allowed the executor to stand as a creditor in competition with the other bond-creditors of the testator. The Master's proposition was, that the executor, in the circumstances stated, must be considered in equity as a purchaser of the bonds, and entitled only to stand in the place of the original obligees.

That the executor might have preferred the bond-creditors to whose bonds the present question applies, was not disputed, and it was (properly I think) admitted at the bar, that if the executor, at the time of the transactions in question, had cash in hand, part of the assets, which he might have handed over to the bond-creditors, the mere omission to go through the form of handing over the money, and receiving it back again, would not affect the validity of the transactions, and that the claim of the executor ought to prevail; but it was said, that if at the time of the transactions there was no cash available to the satisfaction of the bond-debts, the exceptions must fail. With reference to this argument, I thought it was, or might, be material to ascertain the state of the *assets at the time of the trans- [*568] actions in question. The Master's report does not furnish this information in form and specie, but it was thought that it might be satisfactorily collected from the report and the schedules to it, and the cause stood over until the following day, in order that the report and the schedules might be looked into.

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It appears that, by the will of the testator, the executor, as legatee of his business and stock in trade and some other effects, was entitled to purchase the same at a valuation; this he did, and he is charged by the Master with the amount of such valuation; and as the creditors, who might have resisted this, have not excepted to the report, they must be considered as adopting and taking the valuation, with all the consequences of doing so. The executor says, that the goods became his, and the price he was to pay was cash in hand, applicable to the payment of debts of the testator. I thought, however, that I could not consider this purchase by the executor as of an earlier date than that on which it took place, for until that time it was uncertain whether the executor would purchase the effects or not. In order, therefore, to support his assertion that he had cash in hand at the time of the transactions referred to, it was necessary to ascertain when the executor actually became a purchaser of the property. The date assigned by the executor is the month of April, 1842. The plaintiff refers the purchase to December, 1842, at which time the Master apparently had charged the executor with the valuation of the property. This date, however, was explained by counsel, from instructions given in Court. No evidence has been produced on the point. I cannot assume the report wrong without evidence, and I am not disposed to help the executor by inquiry in such a case. I cannot therefore decide [*569] the question, whether *the executor had cash in hand at the time the bonds were delivered up.

Assuming, however, that the executor, if he had not cash, had the wines and stock in trade of the testator, of a value more than sufficient for the satisfaction of these debts, the question arises, whether such possession of assets is sufficient to enable the executor to treat these transactions as payments of the bonds in question: I confess I cannot in principle distinguish goods from cash, or one species of assets in hand from another. The executor might have handed over and received back either one or the other, and the legal effect would have been the same. Can the omission of such a form make any substantial difference

 1847.—*Malcolm v. Scott.*

in the effect of the transaction? I think not. The testator's estate is in fact discharged in either case.

I have assumed that assets, either in goods or cash, were in the hands of the executor when he produced the discharge of the bonds. If this be not admitted to have been the fact, the case must be referred back to the Master, to ascertain the truth of the case in this respect.

*MALCOLM v. SCOTT.[1]

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1847: 2nd, 4th, 5th, March; 13th April.

A Calcutta firm, by a letter dated in January, and received in London on the 11th March, 1841, directed their London correspondents to hold a sum of money, (equal to a lac of rupees, at the current rate of exchange,) payable on the 19th November, following, out of remittances and consignments on the general account, at the disposal of a creditor of the Calcutta firm in Liverpool. The Calcutta house at the same time acquainted the Liverpool house of the directions which had been given. The London house informed the Liverpool house that they had received and registered the order; and after stating that they were in advance of the Calcutta house, and declining to accept bills for any part of the amount, said, that if remittances should come forward to enable them to meet the wishes of the Calcutta house, they would lose no time in advising the Liverpool house. The London house also, in acknowledging to the Calcutta house the receipt of the order, said, that the state of their accounts did not then warrant them in meeting the requisition, but they would meet it, if in a position to do so, before November. The Calcutta house revoked the order by a letter of January, 1842, received by the London house on the 12th March, 1842.

Held, that the effect of the triple correspondence between the Calcutta house and the London house, the Calcutta house and the Liverpool house, and the London house and the Liverpool house, entitled the Liverpool house, as against the London house, to an account in equity of the balance on 12th March, 1841, on their general account with the Calcutta house, (giving the London house credit, in such account, for all liabilities incurred by them on behalf of the Calcutta house on that day,) and of the consignments and remittances of the Calcutta house to the London house in the general account, which came to the hands of the latter between the 12th March, 1841, and the 12th March, 1842.

[1] See *Malcolm v. Scott*, 20 Law J. Ch. 17; S. C. 2 Hall & T. 440. See note [1.] ante, p. 308.

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The London house might have declined the appropriation, and returned the balance of the account to the Calcutta house, but, they could not, as against the Calcutta house, have retained any balance due to the Calcutta house, except for the purpose which the latter had directed.

Semble, that the London house was not merely bound to pay the Liverpool house the amount directed, so far as the balance of account on the 19th November, 1841, enabled them to do so, but was bound to appropriate all the remittances and consignments from the Calcutta house on general account, from the receipt until the revocation of the order, after reimbursing themselves in respect of their advances and liabilities on behalf of the Calcutta house, at the time they received it.

Semble, that the communications between the Calcutta house and the London house, and the Calcutta house and their Liverpool creditor, would not have entitled the latter firm to the account as against the London house, without the communications which took place between the London and the Liverpool firms.

THE judgment on the motion in this cause, to restrain the defendant, William Adam, from remitting to Adam, Scott & Co., the proceeds of the ship *Forfarshire*, is reported in vol. 3, p. 39.

The original bill prayed a declaration, that the several consignments and remittances made by Adam, Scott & Co., of Calcutta, after the 16th of January, 1841, to Scott, Bell & Co., of London, ought to be applied, in the first place, in payment and satisfaction to the plaintiff of the sum of 10,625*l.*, appropriated to the use of the plaintiff by Adam, Scott & Co., and that an account [*571] of such consignments and remittances might be taken, and the amount thereof applicable to the payment of the 10,625*l.* ascertained; that an account of the plaintiff's dealings with Scott, Bell & Co., might be taken, charging them in such account with the 10,625*l.*, or so much as might be found to have been so received by them, applicable to the payment thereof; and Scott, Bell & Co. might be decreed to pay to the plaintiff what should be found due to him on taking such accounts.

The claim made by the supplemental bill, to a lien on the ship *Forfarshire*, was not prosecuted; and the cause was brought to the hearing, for the purpose of obtaining the relief asked by the foregoing prayer.

The substance of the case was comprised in the following letters:—

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Calcutta firm to the London firm.

"Calcutta, 16th January, 1841.

"Messrs. Scott, Bell & Co., London.

"DEAR SIRS,—Ere this reaches, we hope you will have realized a large portion of our consignments and remittances, via Colombo, China, and Mauritius, to enable you to dispose of the following sums from our general account with you. Although we are pretty confident you will be in possession of funds, we are not certain, and do not, in consequence, grant drafts. We are desirous of remitting Cs. Rs. 100,000 to Mr. George Malcolm, as if, by a draft to-day at ten months date, at exchange 2s. 1 1-2d. per. Cs. Re., 10,625l., which would fall due in London, 19th November next; Cs. Rs. 50,000 to you and Mr. W. Scott for his loan to the writer, dated as above, at exchange 2s. 1 1-2d., 5312l. 10s., together 15,937l. 10s. Should you be in possession of funds, we have to request the favor of your holding these sums at Mr. Malcolm's and your own disposal respectively, under *the discount of the Bank of England rate. We shall [*572] know to a certainty, in a short time, whether funds sufficient will be transmitted to you to meet these sums on or before the 19th of November next; and, should it appear to us that there will not be enough, we shall send you a remittance from this, to go to credit of your general account.

"ADAM, SCOTT & Co."

Calcutta firm to the plaintiff.

"Calcutta, 16th January, 1841.

"MY DEAR SIR,—Before we can make up our accounts here, we must be put in possession of all the accounts from you, relative to the transactions of the Calcutta firm up to the 30th April last; and I am unable, in consequence, to say how our cash account will stand, so as to enable me to regulate the remittance of your stock, and that standing in my own name; but being anxious to make some funds available to you, I have written officially to Messrs. Scott, Bell & Co., to hold at your disposal, on or before the 19th of November next, 10,625l., being

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the equivalent of Rs. 100,000, exchange 2s. 1 1-2d. Our friends will hold this amount at our disposal under discount, immediately after the receipt of this, or as soon as they are in possession of funds.

“J. S. B. SCOTT.”

London firm to the plaintiff.

“London 12th March, 1841.

“We beg to advise you that by the overland letters from India, received yesterday, we are requested by Messrs. Adam, Scott & Co., to account to you for the equivalent of Ca. Rs. 102,000, at 2s. 1 1-2d. per rupee, ten months after the date of their letter, (16th January last,) or to hold that amount at your disposal under discount at the Bank of England rates, if convenient to us, and provided we are in funds from their consignments and remittances via Colombo, China and the [*573] *Mauritius. At the present time we are considerably in cash advance for the firm, and the consignments and remittances hitherto advised will, we think, fall short of the engagements we are under on their account. We have however registered the above; and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you. Meanwhile, &c.

“SCOTT, BELL & Co.”

Plaintiff to the London firm.

Liverpool, 12th March, 1841.

“Messrs. Scott, Bell & Co.

“We are favored with your letter of yesterday, inclosing two letters from Madras to our address, and draft on us by Collykiner Pollett, due 30th instant, for 2500*l.* for acceptance * * * Messrs. Adam, Scott & Co., inform us, in their letter of the 16th January last, received this morning by the overland mail, that they had written to you to hold at our disposal, on or before the 19th November next, 10,625*l.*, and that you would hold this account at your disposal, under discount, immediately after receipt of their letter, or as soon as you were in possession of funds.

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Would you have the goodness to let us know whether you will allow us to draw on you for the whole amount due on the above date, or for a part at a shorter date?

“GEORGE MALCOLM & Co.”

Plaintiff to the London firm.

“Liverpool, 13th March, 1841.

“Messrs. Scott, Bell & Co. .

“I am favored with your letter of yesterday. It may be proper to inform you, that the money which Messrs. Adam, Scott & Co., request you to hold at my disposal, namely, Ca. Rs. 100,000, or 10,825*l*. cash, 19th November next, is a portion of my own funds, *which I expected to have received [*574] direct. In ordering the payment through you, they will, of course, make due provision for it; and although they could not know how much of the amount might be realized by you at dates prior to the 19th November, there is no doubt expressed as to your being, ere that time, in funds for the whole. There is evidently no reason to suppose anything else than that ample remittances are on the way, or that they will be received in good time; but in order to prevent uncertainty or mistake on this point, Messrs. Adam, Scott & Co.’s attention may be drawn to the subject by letters by next overland mail, so that there may be a timely correction of any oversight or miscalculation on their part. The enclosed letter from J. T. B. Scott (which please return,) will show that he intended to make the money available to me; and indeed he could not but know that it must be both inconvenient and disadvantageous to me to be deprived of the use of so considerable a sum for eight months longer. Should you be disposed to give effect to his views and arrangements, by granting acceptances due 19th November, as proposed in G. Malcolm & Co.’s letter of yesterday, they will engage to make due refund of any part of the money short, remitted from Calcutta; but I have no apprehension of any such short remittance.

“GEORGE MALCOLM.”

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This letter enclosed the foregoing letter of the 16th of January, 1841, from the Calcutta firm to the plaintiff.

London firm to the Calcutta firm.

"London, 14th March, 1841.

"Messrs. Adam, Scott & Co.

"DEAR SIRS,—Acknowledging the receipt of various letters, and amongst others, the following, 16th January, [*575] *requesting us to account to Mr. Malcolm for the equivalent of 100,000 rupees at 2s. 1 1-2d., 10,625l., ten months from the date of your letter, arising from your consignments or remittances via Colombo, China, and the Mauritius, to discount the same at bank rates, you will be aware, before you receive this, that the present state of your account, and of the advices of consignments and remittances coming forward from other quarters, added to the liabilities we may be under on account of your silk piece goods speculations, will not warrant us meeting this requisition for the present. But should we be in a position to meet it before November next, we shall have pleasure in doing so, and have written to Mr. Malcolm accordingly. The other transfer alluded to in your letter, was made on the 31st of December last, agreeably to instructions from Mr. Malcolm in July last, acknowledged by your No. 100 of 27th October.

"SCOTT, BELL & Co."

London firm to the plaintiff.

"London, 15th March, 1841.

"DEAR SIR,—Replying to your letter of the 13th instant, we beg to state that we have no specific knowledge of the remittances via China and the Mauritius, referred to by Messrs. Adam, Scott & Co.; but as a series of about a dozen of their letters are not yet come forward, they may perhaps contain the necessary information: and we can only repeat what we said on the 12th, that when remittances or consignments come forward, we shall lose no time in advising you. Meanwhile, it would not be convenient

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for us to lend our names to acceptances in the manner you propose.

“SCOTT, BELL & Co.”

Plaintiff to the Calcutta firm.

“Liverpool, 3rd April, 1841.

“On receipt of your Mr. Scott’s letter to Mr. Malcolm, dated 16th January, we addressed Messrs. Scott, *Bell & Co. on the subject of your order to them to [*576] hold at our disposal, on or before 19th November next, 10,625*l.*, being the equivalent of the Company’s rupees 100,000, at the exchange of 2*s.* 1 1-2*d.* They informed us in reply, that with reference to the state of your account with them, they must decline, for the present, making any payment or granting any acceptance on account of your said order. You readily conceive the disappointment and the serious inconvenience it is to us to be deprived of the use of so considerable a sum of money. We rely on your taking immediate measures to make the above sum, together with any other money due on Mr. Malcolm’s account or on our general account, available to us by remittances to ourselves direct, and not to make the payment to us dependent on the position of your London account, which it must be difficult for you to estimate exactly, owing to the uncertainty as to the out-turn of your produce remittances.

“GEORGE MALCOLM.”

Calcutta firm to the plaintiff.

“Liverpool, 20th April, 1841.

“We have now made our entries in conformity with the statements of our account-current forwarded in your letters Nos. 5 and 6, both of which appear to be correct; and we beg to wait upon you with further statement of our London exchange account up to this date, showing at credit side 57,205*l.* 12*s.* 4*d.*, at debit side 39,690*l.* 17*s.* 4*d.*, ditto dependencies 34,919*l.* 6*s.* 11*d.*, 74,610*l.* 4*s.* 3*d.* Balance in our favor, 17,404*l.* 11*s.* 11*d.*, against

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which will come our conditional order of 10,000*l.* in favor of Mr. Malcolm."

Calcutta firm to the plaintiff.

"Calcutta, 1st June, 1841.

"Messrs. George Malcolm & Co.

"DEAR SIR,—Your letter, No. 438, of the 3rd of April, [*577] informs us that our London friends Messrs. Scott, *Bell & Co., on being applied to by you on the subject of our order to them to hold at your disposal, on or before 19th November next, 10,625*l.*, had declined for the present making any payment or granting any acceptances on account of such order, and conveyed to us the expression of your disappointment, and a request that we may immediately make remittances to yourselves direct, of the above amount, with any other money due your Mr. Malcolm, and on your general account. We are ourselves much disappointed at this proceeding on the part of our London friends, who have likewise advised us of it, and stated their wish to meet the order before November, should they find themselves warranted, by the state of our account, in doing so. We do not doubt in the least they will be in a position to pay the amount from the proceeds of our shipments to them; and were it even otherwise, the presence of Mr. Scott would, we are assured, accommodate the matter; so that we do not think it necessary to notice further your request for remittances to yourselves direct.

"ADAM, SCOTT & Co."

[Calcutta firm to the London firm.]

In a letter, dated Calcutta, 18th January, 1842, which was received by Scott, Bell & Co., in London, on the 10th March, 1842, Adam, Scott & Co. revoked the order for the appropriation of their general remittances in payment of the 10,625*l.* to the plaintiff.

Mr. Wood, Mr. Rolt, and Mr. Roundell Palmer, for the plaintiff.

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Mr. *Prior*, for the assignees of Adam, Scott & Co.

Mr. *Romilly* and Mr. *Blunt*, for the defendants Scott, Bell & Co.—In order to establish a claim of this kind, two *things at least are necessary: there must be, first, some [*578] property, or chose in action, to assign; and, secondly, an actual assignment. Both of these elements are wanting. There was no debt owing by the London house to the Calcutta house, at the time to which the plaintiff refers the order or alleged assignment upon which his claim is founded; nor is there any assignment of such a debt, if it had existed. As to the existence of the debt, that is not admitted; and the language of the correspondence, in fact, excludes it, in March, 1841, whatever might have been the state of the account between the Calcutta and London houses at a later period. Assuming, for the purpose of this argument, that A. assigned to B. the moneys owing to him by C., and nothing was due, how could it be said that moneys, afterwards paid to C. on account of A., would pass by this assignment? But, in this case, there was in fact no assignment. This question must be tried by the intention of the parties; and it is obvious that the Calcutta house did not intend to create, nor did the London house intend to be parties to any such assignment. Both parties intended to retain their dominion over the funds in question. The order was conditional, and revocable until actually executed. The London house entered into no contract. They merely informed the plaintiff of the communication which they had received. This cannot be construed as an acceptance of the order, unless everything short of a positive refusal be held to be an acceptance. There is no ground for the interference of a court of equity. The right, if any, is purely legal. If the legal right be established, the Court may think it proper to give the account; but, in the first place, the Court will do nothing more than retain the bill, giving the plaintiff liberty to bring an action. If, however, the Court should think proper to direct an account, a question would arise with regard to advances *made by the London house on account of the Calcutta [*579] house, after March, 1841. On this point the case of

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advances by a first mortgagee to the mortgagor, after notice of a second mortgage, is analogous. The utmost extent of the engagement of the London house is to pay the debt of the plaintiff, on the 19th November, 1841, if they were then in funds. They do not undertake to reserve for this purpose all the consignments which should come to their hands between March and November, nor do they undertake so to apply the consignments or remittances which they should receive after the 19th of November. The account, therefore, if any be directed, must be limited to the balance on the 19th of November, subject to be reduced by the amount of the then outstanding liabilities of the London house on account of the Calcutta firm.

The cases cited were *Williams v. Everett*, (a) *Stewart v. Fry*, (b) *Kilsby v. Williams*, (c) *Gibson v. Minet*, (d) *In re Douglas*, (e) *Garrard v. Lord Lauderdale*, (f) *Hutchinson v. Heyworth*, (g) *Burn v. Carvalho*, (h) *Walker v. Rostron*, (i) *Miln v. Walton*. (k)

VICE-CHANCELLOR :—This suit had two distinct objects; one related to the ship called the *Forfarshire*, and the other related to the rights of the parties in the cause, respecting certain consignments from India, depending upon a correspondence commencing in the month of January, 1841. The question relating to the *Forfarshire* came before me upon motion, and the [*580] decision upon that motion was submitted *to. On the cause coming on for further hearing, nothing remained to be done on that part of the suit, and as to that, therefore, the bill must be dismissed with costs. The observations which follow apply to the other parts of the case.

At the time of the correspondence, Adam, Scott & Co. carried on business at Calcutta. The plaintiff carried on business at Liverpool, under the firm of Malcolm & Co.; and the defendants Scott, Bell & Co., carried on business at London. At the time

(a) 14 East, 582.

(b) 7 Taunt. 339.

(c) 5 B. & Ad. 815.

(d) 2 Bing. 7.

(e) 1 Mont. & Chit. 1.

(f) 3 Sim. 1.

(g) 9 Ad. & E. 375.

(h) 4 My. & Cr. 690.

(i) 9 M. & W. 411.

(k) 2 Y. & C. O. C. 354.

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of the correspondence the plaintiff's house at Liverpool was a creditor upon the Calcutta house for a large sum of money, and at the same time the house of Scott, Bell & Co. were also creditors of the Calcutta house and were under engagements which might result in a further debt owing from the Calcutta to the London house.

The questions to be decided in this cause are two—First, whether, by the effect of the correspondence which passed between Adam, Scott & Co., of Calcutta, Scott, Bell & Co., of London, and the plaintiff George Malcolm, of Liverpool, a contract was come to between these parties, in March, 1841, entitling the plaintiff, as a creditor of the Calcutta house, to an account against the London house, (also a creditor of the Calcutta house,) for consignments and remittances made to the London house by the Calcutta house? The second question is, if such a contract be established, what are the terms of that contract, and to what account does it entitle the plaintiff? I use the word "contract" as the most convenient term which suggests itself; for whether such rights as the plaintiff has are said to rest in contract generally, or, according to the argument at the bar, are said to rest on an equitable assignment, the case is the same. The right claimed by the plaintiff will depend upon an account to *be taken in this court; the result of which will be, to [*581] be satisfied out of specific consignments from India included in that account.

With respect to the answer to be given to the first of these questions, I might perhaps safely dispose of it without argument, by referring to the answer in which the defendants Scott, Bell & Co., submit to account; but as these defendants have contended that the correspondence gives to the plaintiff no right to an account, and that the submission in the answer ought not to bind them, I will consider the plaintiff's right independently of that submission. That the correspondence entitles the plaintiff to some account I cannot bring myself to doubt, and I shall begin by referring, in the first instance, to the entire correspondence upon which both questions turn.

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[His Honor read the letters stated above.]

Several other letters passed between the London house and the Calcutta house, which are observed upon by the Liverpool house. The state of the account between the Calcutta and the London house is adverted to, and the expression "conditional order," referring to the order in the plaintiff's favor, is used. This expression, as it appears to me, clearly means no more than the expression "being in funds;" and the question is, whether they were in funds? In no other way can I understand the term "conditional" as having any application to the case.

Now, upon the above letters, (exclusive of the submission in the answer,) I cannot doubt the plaintiff's right to some account against the London house. The letter of the 16th of January, from the Calcutta to the London house, directs them, [*582] amongst other things, if in *funds upon the "general account," to hold 100,000 Ca. Rs., equivalent to 10,625*l.*, at the plaintiff's disposal, promising additional remittances, if necessary to make up the amount. This letter was received in London on the 11th of March, 1841. On the following day, the 12th of March, the London house wrote to the Liverpool house the letter of that date; and (with reference to the argument at the bar) there are three points to be noticed in that letter. I think, upon the fair construction of the letter, the expression "if convenient to us" clearly applies to the alternative relating to the discount; secondly, the letter reserves to the London house the right of satisfying all "engagements" they were under on account of the Calcutta house; by which word "engagements" I understand the London house to mean all liabilities and dependencies of every description; and thirdly, subject to that reservation, the London house agrees, in some sense, to act upon the letter of the Calcutta house of the 16th of January. The construction which, upon this point, I put upon the letter of the 12th of March, 1841, does not, in my opinion, admit of serious controversy. The expressions in the letter of the 12th of March, from London to Liverpool, are "We have, however, registered the above, and should remittances or consignments

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come forward to enable us to meet their wishes, we shall lose no time in advising you." And if these words were ambiguous, (which I think they are not,) the construction I put upon them would be established by the following expressions in the letter of the same writers to the Calcutta house two days afterwards, the 14th of March. After referring, in the letter of the 14th of March, to the letter of the 16th January, and saving to themselves the right to satisfy the engagements they were under for the Calcutta house, they say, "But should we be in a position to meet it before November next, we shall have pleasure in doing so, and have written *to Mr. Malcolm accordingly. [*583] This sentence appears to me correctly to paraphrase that which I have quoted from the letter of the 12th of March. If the latter sentence had been contained in the letter of the 12th of March, the case, as it appears to me, would not have admitted of serious argument. The Liverpool letter of the 13th of March points out to the London house in what terms the Liverpool house understood the London letter of the 12th. The London letter of the 14th of March to the Calcutta house, which I have just referred to, becomes important, for it shows beyond dispute that I have correctly understood the letter of the 12th of March from London to Liverpool. The letter of the 15th of March, 1841, from London to Liverpool, is also important, because it brings down the whole of the former correspondence to that date, and confirms such engagements as had been come to by the earlier letters. The letter of the 3rd of April, 1841, from London to Calcutta, and of the 1st of June, 1841, from Calcutta, independently of what had been done before, appears to me to make out completely the same view of the case.

Admitting, therefore, in the most unqualified manner, that the correspondence between the Calcutta house and the London house, and that between the Calcutta house and the Liverpool house, would not, without more, have conferred any right upon the plaintiff as against the London house, I cannot admit that it is now open to argument, that the effect of the triple correspondence, in which each party refers to his communications with

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the other, has not so consolidated the whole correspondence as to give to each as against the other, for the purposes of this cause, the benefit of a contract, such as the correspondence, properly interpreted, contains.

The second, and the most difficult question which arises, [*584] *is that which remains—What is the contract embodied in the preceding letters, and to what account does it entitle the plaintiff as against the London house?

The plaintiff has contended, that according to the true construction of the correspondence, he is entitled to have a balance struck on the 12th of March, 1841, in the books of the London house, as between that house and the Calcutta house, including, as he admits, an account of all engagements and liabilities then depending between the London and the Calcutta house; and in that sense I shall hereafter use the word "balance." He admits the right of the London house to have all the consignments and remittances from Calcutta, on "general account," after the 12th of March, 1841, applied in satisfaction of the balance due on the 12th of March, 1841; but he insists, that after satisfying the above, he is entitled to have all the consignments and remittances from the Calcutta to the London house on "general account," after that date, applied in satisfaction of the 100,000 Cs. Rs., or 10,625*l.*, made payable on the 19th of November, 1841, in preference to any claim the London house may have against the Calcutta house in respect of new transactions originating after the 12th of March, in like manner as if such consignment or remittance had been specifically appropriated by the Calcutta house. He insists, in effect, that the contract embodied in the correspondence had, once for all, the effect of a general appropriation of all remittances and consignments made on "general account" after the 12th of March, 1841. Scott, Bell & Co., however, say that their undertaking (if any) was confined to an undertaking to pay the 100,000 Cs. Rs. on the 19th of November, 1841, if in funds on that day, and not otherwise; and for the purpose of ascertaining whether they

[*585] are in funds, or *not, they claim a right to have all consignments and remittances from Calcutta on "general

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account," received after the 12th of March, 1841, applied, in the first instance, in satisfaction of their own demands against the Calcutta house up to the present time, whether their demand originated out of transactions before or after the 12th of March, 1841.

In stating the above, I have omitted to notice the 50,000 Cs. Rs., equivalent to 5312*l.* 10*s.*, mentioned in the letter of the 16th of January. No question appears to me to arise upon that; but if necessary it may be made a matter of inquiry, whether it has been paid.

Two of the letters, that of the 16th of January, 1841, from the Calcutta to the London house, and that of the 12th of March, 1841, from the London to the Liverpool house, must in strictness determine the dispute. I do not mean that the other letters are not important, as throwing light upon these two letters, and as confirming the interpretation I put upon them; but it is on the expressions in those two letters, properly interpreted, that the rights of the parties must in my opinion be founded. I will first, then, suppose a single remittance or consignment from Calcutta between the 16th of January, and the 19th of November, 1841, to have been made in pursuance of a promise contained in the letter of the 16th of January, and consider this case, attending first to the fact, that nothing afterwards occurred until January, 1842, by which the Calcutta or London house gave notice to the plaintiff that his position was to be altered; and secondly, advertng to the fact, that during the whole of that period the Calcutta house claimed to be creditors upon the London house.

*Upon the question, then, of the construction of the [*586] two letters I have adverted to, the letter of the 16th of January, 1841, (as between the Calcutta and London house,) was, in the first instance, imperative if in funds, on "general account." On receipt of that letter, that is, after satisfying the balance as above explained, the London house was to hold the 100,000 Cs. Rs. at the plaintiff's disposal, in the way directed. The London house might have declined this, and might have returned the balance, after satisfying their own claim, to the

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Calcutta house, but they could not, as against the Calcutta house, have lawfully retained it for any purpose, except that indicated in the letter of the 16th of January, in the plaintiff's favor. The expressions in that letter appear to me to be unequivocal in this respect: "Ere this reaches, we hope you will have realized"—that is, already realized, "a large portion of our consignments and remittances via Colombo, China, and the Mauritius, to enable you," that is, to enable you, on the receipt of the letter, "to dispose of the following sums from our general account with you." Nothing can more clearly point at an engagement to be made with the plaintiff at that time, conditionally only on the London house being then in funds. The letter proceeds—"Although we are pretty confident you will be in possession of funds," that is, will be so on the receipt of this letter, "we are not certain, and do not in consequence grant drafts." This is to the same effect as the former passage; that is, we should by drafts have required you to come under a present liability in favor of the plaintiff, to be satisfied in November, but that we are not certain whether the funds now in hand, or remitted, will be sufficient to cover it. Then follow the two payments required to be made, one to the plaintiff, and the other to them—"and as if by a draft to-day at ten months [*587] date, which would fall due on *the 19th of November."

Stopping here, I would ask whether it would be possible to contend with effect, that if the London house had been in funds on the 12th of March, 1841, or had become so by an immediate consignment or remittance, and had written to Liverpool, saying simply, "We undertake to act on the instructions in the letter of the 16th of January," they could afterwards have diverted the funds in order to satisfy any new engagement between themselves and the Calcutta house, originating between the 12th of March and the 19th of November? My opinion is, that they could not have done so. The letter of the 16th of January proceeds thus: "Should you be in possession of funds," that is, on receipt of this, be in possession of funds, "we have to request the favor of your holding these sums at Mr. Malcolm's and your own disposal respectively, under the discount of the

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Bank of England rate,"—an expression which clearly indicates a present liability to be satisfied on the 19th of November, 1841. The letter then concludes with this important passage: "We shall know to a certainty, in a short time, whether funds sufficient will be transmitted to you to meet these sums on or before the 19th of November, next; and should it appear to us that there will not be enough, we shall send you a remittance from this to go to credit of your general account. The words "in a short time" show to demonstration that the further remittance on "general account," if necessary, as matters then stood, was to be made to meet the engagements with the Liverpool house.

The London house being in possession of the above letter, wrote to the Liverpool house the letter of the 12th of March, and after speaking of the engagements they were then under for the Calcutta house, as compared with the remittances and consignments "hitherto *advised,"—they [*588] say, "We have, however, registered the above, and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." Upon the effect to be given to that sentence, the whole question appears to me to turn; and I will first consider its effects as between the London and Liverpool house.

Great stress was laid by the plaintiff on the word "registered." I am not disposed to give much weight to that expression. If the letter had ended there, I should probably have thought that the letter amounted to this only,—that the London house, in the existing state of their engagements with the Calcutta house, declined at that time to come under any engagement in pursuance of the letter of the 16th of January, but that they had registered,—that is, made a note of that letter as a thing to be acted upon or not, according to circumstances. I cannot think, that, by informing the Liverpool house that they had registered the letter, they were necessarily precluded from making any new arrangement with the Calcutta house. But it appears to me unnecessary to speculate upon this point; for if the word "registered," standing alone, would have any such meaning in the abstract as the plaintiff has contended for, it appears to me that

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such meaning would be reduced, as well as fixed, by that which immediately follows, namely, "Should any remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." They registered the letter for that purpose. Here again, if any doubt could exist as to the abstract meaning, in mercantile language, of the word "advising," that doubt would be removed by the context. The writers will advise the plaintiff, if any remittances or consignments should come forward to enable them to meet the wishes [*589] of the Calcutta house, *expressed in the letter of the 16th of January. Now what were those wishes? They were, that the balance of the Calcutta house (if any,) then in the hands of the London house, after satisfying their own demands, to be increased, if necessary, by further remittances from Calcutta on "general account," should be held at the plaintiff's disposal. The reason, assigned in the letter of the 16th of January, for not drawing drafts, and the promise of further remittances for the purposes of their letter, is conclusive as to the "wishes" of the Calcutta house; and as the London letter of the 12th of March refers to the "wishes" of the Calcutta house, it makes the letter of the 16th of January part of the contract contained in that of the 12th of March. The London letter of the 14th of March (only two days later) I have already noticed. For what purpose, then, was the London house to advise the Liverpool house of remittances and consignments coming forward to enable them to meet the wishes of the Calcutta house, unless those wishes were to be acted upon? I think the plain and natural effect of the letter is this. If the present funds shall suffice to cover our present balance, (explaining the word "balance" as above,) or if the Calcutta house fulfils its promise and sends further remittances or consignments more than sufficient to cover our balance, we will execute their wishes in your favor. The cases cited at the bar are not nearly so strong in the plaintiff's favor, as are the expressions in the letter I have referred to.

There is nothing in the letter of the 8th of April 1841, or in the letters of subsequent date, which necessarily imports that the

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writers of those letters had put upon the letters of the 16th of January and the 12th of March that construction for which the London house contends, in opposition to that for which the plaintiff contends. The word, "conditional," as I [*590] have before observed, is consistent with the plaintiff's case; that is, the order is conditional upon their being funds sufficient then in hand, or funds afterwards remitted, which leaves the question of fact open.

It was said, however, for the London house, first, that it could not have been in the contemplation of any of the parties, that the transactions between the London and Calcutta houses should not proceed in their usual course, during the interval between the 12th of March and the 19th of November, 1841; and, secondly, that, if I put upon the correspondence the construction I have done, I should altogether paralyse those transactions. To the former of these observations I accede, but I cannot accede to the conclusion drawn from it. Nothing is more common in operations between a London house and its correspondent abroad, than for the former to accept drafts or bills drawn upon it by the latter, at distant dates, in expectation only of consignments or remittances to be made from abroad to meet the drafts or bills at maturity. In that case, the London house becomes liable to third parties, whether remittances to meet the bills are made or not, and they regulate their subsequent transactions with their correspondents abroad accordingly. The engagement in this case, as I interpret the correspondence, was far less onerous; for it was an engagement with the third party, the Liverpool house, only to pay in case the remittances arrived; and, if this engagement were made in the sense in which I understand it, the London house would regulate its transactions with the Calcutta house during the interval between the 12th of March and the 19th of November, 1841, with reference to that engagement, in the same way as it would have done, if bills had been accepted. I am persuaded that no mercantile man would say, that an *absolute engagement by the London house, [*591] confiding in the solvency of the Calcutta house, was so out of course in mercantile transactions, that I must strain the

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construction of the correspondence, rather than believe that such an engagement could have been contemplated. The engagement, as I interpret the correspondence, was that the funds in hand and promised consignments and remittances, on "general account," not required to cover the London balance, should be accounted for to the plaintiff, the effect being, that the promised consignments and remittances would come to the London house specifically appropriated by the effect of the contract as between the London and Calcutta houses, until the authority was revoked. I cannot doubt this, and the triple correspondence appears to me to put the case on the same footing between all the parties.

The observations on this part of the case may be fortified. It was said that the London house has come under new liabilities for the Calcutta house, since the 12th of March; and it is, in fact, for the purpose of meeting these subsequent engagements that the London house makes the claim in this suit. If such has been the course of dealing between the London and the Calcutta house since the 12th of March, 1841, why should I hesitate to believe that the London house, among other engagements, should contract with the plaintiff, at the request of the Calcutta house, to satisfy his demand, according to the order of time at which the debt arose? As to the continuance of the original intention of the Calcutta house until the order was revoked, I can entertain no doubt. They claim, as I before noticed a balance to be due to them from the London house; they might have sent remittances or consignments specifically appropriated for the Liverpool house, unless they had considered the appropriation as [*592] sufficiently made by their *previous correspondence directing the application of the general balance. If the balance be now in favor of the Calcutta house, the London house will not be damaged by the appropriation of the dependencies on the 12th of March, as between themselves and the Calcutta house.

On the 18th of January, 1842, the Calcutta house wrote to the London house a letter, which was received by the latter on the 10th of March, 1842, revoking the direction to apply the consignments and remittances, under the letter of the 16th of Janu-

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ary, 1841. Now, as the Calcutta house clearly might have sent them consignments specifically appropriated, I do not see why they should not have had power to revoke the application of such consignments. The Calcutta house might, if they had pleased, have bound every specific consignment by directing an appropriation, or they might have consigned them elsewhere. Their direction on a given day, that all which should be carried to the general account should be applied in a certain manner, was an appropriation to that specific purpose; but if before the date of any particular consignments they altered their intentions with regard to such appropriation, I see nothing to prevent them from directing that the future consignments should be applied in another mode; and such a direction they in fact gave.

This Court doth order and decree, that so much of the plaintiff's bill as relates to the ship *Forfarshire* and freight, in the pleadings mentioned, be dismissed as against the defendants, William Scott, John Scott, and Peter Bell, with costs, to be taxed, &c. And it is ordered, that the plaintiff do pay unto the said defendants the amount of such costs, when taxed. And it is ordered, that it be referred to the Master, &c., to inquire and state &c. what was the balance of the account (called the general account) in the pleadings mentioned, between the London house of William Scott, John Scott, and Peter Bell trading under the firm of Scott, Bell, & Company, and the Calcutta house of George Ure Adam & James Stewart Blaikie Scott, heretofore trading under the firm of Adam, Scott, & Company, in &c., on the 12th day of March, 1841: and it is ordered, that the said Master do treat such balance as the first item in the account hereinafter directed: and it is ordered, that he do carry on such account in manner hereinafter directed, (that is to say):—It is ordered, that the said Master do debit the said Calcutta house with all moneys paid, and all sums properly debited by the said London house, and all sums for which the said London house are now liable, which payments, debits, and liabilities respectively the said Master shall find to have been made or arisen in respect of engagements existing on the 12th day of March, 1841, on the said general account: and it is ordered, that the said Master do credit the Calcutta house with all moneys received, and all remittances and consignments on the said general account received or at the disposal of the London house, before the receipt by the London house of the letter of the Calcutta house, dated the 18th day of January, 1842, in &c.; and all other sums (if any) for which the Calcutta house is entitled to credit in respect of the transactions depending on the said general account, up to the date of the receipt of the last-mentioned letter: and it is ordered, that the said Master do take an account of what (if anything) is due to the plaintiff in respect of principal and interest on the debt of 10,625*l.* in the pleadings mentioned, from the 19th day of November, 1841; but such accounts are to be without prejudice to any question in these causes.

1848.—Walker v. Eastern Counties Railway Company.

Usual directions for production of documents, and examination of parties. Just allowances. Liberty to state special circumstances. Further directions and costs (except as aforesaid) reserved. Liberty to apply.

[*594] *WALKER v. EASTERN COUNTIES RAILWAY
COMPANY.

1848: 3rd, 5th, 6th, 7th, and 14th June.

A party who has received notice from a railway company of their intention, in exercise of powers given by the Railway Act and the Lands Clauses Consolidation Act, to purchase his lands, may sustain a bill for specific performance of the agreement thereby created: and the Court will enforce such agreement by ordering the Company to take the proceedings prescribed by the statute for ascertaining the amount of purchase money and compensation.[1]

THE plaintiff was the owner of some leasehold houses in Phoenix-place and Wheler-street, Spitalfields, where he carried on the business of a tobacco-pipe manufacturer; and on the 4th of September, 1846, he was served with the following notice, signed by the secretary of the Eastern Counties Railway Company:—

“Eastern Counties Railway Stations Enlargement.—To W. G. Walker, lessee or reputed lessee, and to every other person having any estate or interest in the land and hereditaments hereinafter referred to. As secretary, and on behalf of the Eastern Counties Railway Company, and in pursuance of the powers and directions of an act passed in the 9th year of the reign of her Majesty the Queen, intituled ‘An Act to enable the Eastern Counties Railway Company to enlarge their stations in London and at Stratford, and for other purposes,’ I hereby give you and each of you notice that the said Company require to purchase the messuage or tenement, land and hereditaments, described or referred to in the schedule hereto, and which they are

[1] See *Adams v. The London and Blackwall Railway Company*, 3 Hall & T. 285.

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authorized to purchase or take under the provisions and for the purposes of the said last-mentioned act. And, in further pursuance of the powers and directions of the said last-mentioned act, the said Company hereby demand from you and each of you the particulars of your estate and interest in such land and hereditaments, and of the claims made by you and each of you in respect thereof, and which particulars and claims may be delivered at or sent to the office of Mr. John Duncan, No. 72, Lombard-street, London, solicitor of the said Company. And, *in further pursuance of the powers and directions afore- [*595] said, the said Company hereby state, that they are willing to treat for the purchase of your and each of your estate and interest in such messuage or tenement, land or hereditaments, and as to the compensation to be made for the damage that may be sustained by you and each of you by reason of the execution of the works connected with the undertaking. And I also give you notice, that by the last-mentioned act it is provided, that, if, for twenty-one days after the service of such notice as above written, any party shall fail to state the particulars of his claim in respect of the lands and hereditaments required by the said Company, or to treat with the promoters of the undertaking in respect to his interest therein, or if such party and the promoters of the undertaking shall not agree as to the amount of compensation to be paid to such party for any such interest or for any damage that may be sustained by him by reason of the execution of the works, the amount of such compensation shall be settled in manner therein provided for settling cases of disputed compensation. Dated this 2nd day of September, 1846. C. P. Roney, secretary to the said Eastern Counties Railway Company."—The schedule to the notice contained a description of the property.

On the 3rd of October, the solicitor of the Company wrote to the plaintiff, informing him that unless the particulars of his claim for the property should be forthwith delivered, the Company would be obliged to serve the plaintiff with another notice, preparatory to getting a jury summoned to award compensation. On the 27th of October the plaintiff delivered his claim for pur-

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chase money and compensation for the loss of his trade. . The solicitor of the Company, on the 14th of November, wrote to the plaintiff and others, inviting them to meet the [*596] *deputy chairman, in order to agree upon sums to be paid to them. The plaintiff attended accordingly, but his claim was not then discussed. On the 17th of December a meeting took place between the solicitor and the surveyor of the Company, and the plaintiff and his solicitor, at which the claim was discussed, but no agreement was come to.

In reply to a letter of complaint of the delay either in settling, or summoning a jury, the plaintiff's solicitor, on the 30th of August, 1847, received a letter from the Company's solicitor, in which the latter said, "I was not aware, until to-day, that your client required the Company to proceed under the notice, by getting the amount of his compensation ascertained. They do not, at present, require the property of which he is lessee, although they have settled with and paid one of the tenants for the purchase of his interest, and taken possession of the house, and thereby become tenants to your client in respect of that house. I will, however, at once see the Company's surveyor, and make your client an offer, and forthwith take every necessary step under the railway act to get the amount of your client's compensation settled and paid." No further step having been taken, the plaintiff filed his bill on the 6th of October, 1847. The bill alleged, that possession of one of the houses had been delivered to the Company by an under-tenant of the plaintiff, holding by a tenancy from year to year; and the bill charged that the Company threatened to pull down such house.

The bill prayed, that the Company might be decreed to complete the purchase of the premises comprised in the schedule to the notice of the 2nd of September, 1846, by paying to the plaintiff the amount of his said claim, or that the amount of [*597] the purchase moneys and *compensation might be ascertained and determined in the manner provided by the Eastern Counties Railway Stations Enlargement Act, 1846; and that the Company might be decreed forthwith to take all proper

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and necessary measures to ascertain and determine the same, pursuant to the provisions of the said act, and in the manner directed therein, or in the "Lands Clauses Consolidation Act, 1845." The bill prayed an injunction to restrain the Company from pulling down the house in their possession, and that they might be decreed to pay an occupation-rent, to be set upon it by the Court.

The Company by their answer set forth a correspondence, in which they had required an inspection of the plaintiff's books, either by their surveyor or by an accountant, to be approved of by both parties, in order to ascertain the amount of compensation he was entitled to for the loss of his trade, but which inspection the plaintiff had not consented to give; and the Company insisted that a settlement of the amount to be paid had not been come to, owing to the default of the plaintiff. The Company submitted, that, under the Lands Clauses Consolidation Act, 1845, as well as by their said special act, the plaintiff was bound to require and give notice to the defendants to proceed to ascertain the amount of compensation, either by summoning a jury or proceeding to arbitration; but he had given no such notice. The Company denied that they had entered into possession of the house referred to, or that they had any intention of pulling it down.

The *Solicitor-General* and Mr. *J. H. Law*, for the plaintiff.—The notice constitutes a contract on the part of the Company, from which they cannot withdraw; **Tawney v.* [*598] *The Lynn and Ely Railway Company*, (a) and which the plaintiff can compel them to carry into effect, either by mandamus, (*The King v. The Hungerford Market Company*, (b) *The King v. The Commissioners for improving Market-street, Manchester*,) (c) or ("the relative situation of vendors and purchasers being constituted between them:" *Stone v. The Commercial Railway Company*,) (d) by bill for specific performance in this court. (e)

(a) V. C. of England, 20th March, 1847; 16 Law J., Rep. Eq., 282.

(b) 4 B. & Adol. 327.

(c) Id. 333, n.

(d) 4 Myl. & Cr. 122.

(e) 1 Railw. Cas. 400, 401.

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It was true the price was not ascertained, but this the Company had the power of fixing by means of the jury, and they would not be permitted to evade the exercise of that power: *Milnes v. Gery*,^(a) *Hall v. Warren*,^(b) *Blundell v. Brettargh*,^(c) *Gourlay v. Duke of Somerset*.^(d) If the Company were bound to take the land, they were equally bound to take proper steps for ascertaining the price to be paid. The suit was more beneficial to the plaintiff than the proceeding by mandamus. Several applications for the latter remedy might be necessary before relief could ultimately be obtained: *The King v. The Company of Proprietors of the Nottingham Old Water-works*,^(e) and where the injunction was necessary the Court would give the entire relief, even if the other part of the object of the bill had been exclusively a subject for legal interposition: *Pearce v. Creswick*.^(f)

Mr. Wood and Mr. Grove, for the Company.—The case is one of the first impression. The judgment of Lord Cottenham in *Stone v. The Commercial Railway Company* does not go [*599] to the extent which is suggested—*that this Court will sustain a bill for specific performance. He says only, that the Company by their notice place themselves in the character of persons contracting to purchase. It does not necessarily follow that the vendor has immediately all the remedies of a party who has entered into a perfect contract. The objection to this suit in principle is, that it does not fall within the reasoning upon which the Court interferes to decree specific performance of contracts. That interference is founded upon the insufficiency of the legal remedy, the Court of law giving damages for non-performance, but not the specific thing contracted for: *Harnett v. Yeilding*,^(g) *Betesworth v. Dean and Chapter of St. Paul's*.^(h) So strict was the rule of this Court, of requiring parties to pursue such legal remedies as they had, that it is said, that before the time of Lord Somers a party seeking the benefit of an agree-

(a) 14 Ves. 407.

(d) 19 Ves. 429.

(g) 2 S. & L. 556.

(b) 9 Ves. 605.

(e) 6 Ad. & E. 455.

(h) Sel. Ca. in Chanc. 69.

(c) 17 Ves. 241.

(f) 2 Hare, 286.

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ment was first sent to law, "and if he recovered anything by way of damages this Court entertained the suit." (a) Here, however, it is admitted that the court of law by mandamus can afford the plaintiff the specific relief which he seeks in this Court. This Court has never assumed an authority or jurisdiction equivalent or analogous to that of a Court of law by mandamus: *Weale v. The Company of Proprietors of the West Middlesex Water-works*. (b) The plaintiff in this case, moreover, applies to the Court under the unfavorable circumstance of having prevented the Company from testing the justice of his claim to compensation by the refusal to produce his books, or suffer them to be inspected by agents to be agreed upon between the parties. With regard to premises actually taken possession of by the Company,—supposing such possession to be shown,—the plaintiff might then proceed under the 68th section of the Lands *Clauses Consolidation Act; and if the Company [*600] failed to summon a jury, he would then be entitled to recover the amount of his own claim. On the point with reference to the price being unascertained, they cited *Wilks v. Davis*, (c) and the cases referred to by the plaintiff. The case attempted to be made for an injunction had entirely failed, and the relief, therefore, could not be drawn within the jurisdiction on that ground. They submitted that the bill should be dismissed.

The cases of *Frewin v. Lewis*, (d) and *Gray v. The Liverpool and Bury Railway Company*, (e) were referred to in the course of the argument.

VICE-CHANCELLOR:—The plaintiff is the owner of houses required by the defendants for the purposes of their railway, and has filed his bill as a vendor, praying the specific performance of an agreement by the defendants to purchase the houses, and an injunction to restrain them from converting a portion of the property until the price shall be paid and the contract completed.

(a) *Dodsley v. Kinnorsley*, Amb. 406.

(b) 1 J. & W. 358.

(c) 3 Mer. 507.

(d) 4 My. & Cr. 249.

(e) 9 Beav. 391.

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The first point made by the defendants, who admit their liability to take the house, is, that at the time the bill was filed no such contract as the bill supposes existed. I think that point is not sustainable. The cases cited for the plaintiff clearly establish that the notice of the 2nd of September, served by the Company upon the plaintiff on the 4th of September, had the effect of making a contract between them for the purchase by the defendants of the plaintiff's houses. It is clear that the Company could not, after that notice, have retired from it. After that [*601] notice, the only thing to be ascertained *was the amount of the purchase money ; and as the mode of ascertaining that is prescribed by the statute, it is in contemplation of law certain, although it remains to be ascertained.

Admitting that a contract existed at the time the bill was filed, the case was likened to those cases in which a contract having been made to sell land at a price to be fixed by an individual named, it has been holden that, until the price is fixed, a bill will not lie to enforce the agreement. It appears to me that there is no analogy between the cases referred to and the principal case. In the cases cited, the Court had no means of ascertaining the price to be paid. That is not so in the principal case. The contract is a contract to purchase on the terms prescribed by the act of Parliament, and those terms the Court has the means of applying so as to get at the price.

It was said, in the next place, that no instance existed of a bill filed for such a purpose as this, and that a mandamus to compel the defendants to issue their warrant to the sheriff to summon a jury to determine the price to be paid for the houses was the proper remedy. I certainly do not recollect any case in which a bill has been filed for the simple purpose of effecting that which might be done by mandamus. But, without relying upon the circumstance that the Company, by their arrangement with the tenant of one of the houses, are in a position which enables them to take possession of and convert that part of the plaintiff's property at their will, and that the bill prays an injunction to restrain the Company from converting it, I cannot as matter of principle, deny the jurisdiction of the Court to entertain this bill. If after

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notice by the Company to take the land, and tender of the price, the owner should attempt *to deal with the [*602] property in a manner injurious to the Company, or simply refuse to execute a conveyance, I cannot think that the jurisdiction of this Court would be doubtful; and if that be so, the jurisdiction cannot be denied in the converse case, in which the vendor is plaintiff: *Withy v. Cottle*, (a) *Adderly v. Dixon*. (b) The remedy by mandamus is not specified in the act, and there is nothing, therefore, in the act to deprive the party of any remedy which law or equity furnish for breaches of contract. This is a vendor's bill for the specific performance of an agreement for the sale of houses; and the circumstance that the act of Parliament entitles the purchaser to have the price determined by a jury cannot oust the Court of its jurisdiction in a case otherwise within that jurisdiction.

I say this, however, without prejudice to the question by whom the costs of the suit should be paid, if extra costs have thereby been occasioned, or if the necessity of litigation shall appear to have been occasioned by the refusal of the plaintiff to give the Company reasonable information and evidence as to the amount of his claim. I observe that the Company admit their liability to take the houses,—say they have no occasion for them at present, and insist that the plaintiff should pay the costs of the suit; but the answer does not, although the argument at the bar did, dispute the jurisdiction of the Court.

The case appears to me not to be one in which, admitting in the abstract the jurisdiction of the Court, and reserving the question by whom the costs should be borne in case a decree for the plaintiff is to be made, there is in the circumstances any special ground *for refusing to entertain the suit. Guard- [*603] ing the Company with respect to costs, there is not, I think, any reason why I should refuse the plaintiff a decree.

An argument was founded upon the 68th section of stat. 8 & 9 Vict. c. 18, which in certain cases would enable the plaintiff peremptorily to require the Company to issue their warrant to

(a) 1 S. & S. 174; S. C., T. & R. 78.

(b) 1 S. & S. 607.

1848.—Walker v. Eastern Counties Railway Company.

the sheriff, and on their default recover the amount of his claim. It was said that the power arose here, and I was referred to an allegation in the bill, that the defendants had taken possession of the house No. 40. I find, however, that this allegation is denied by the answer.

Decree the defendants to issue their warrant to the sheriff for summoning a jury to settle the compensation for the premises comprised in the notice of the 2nd of September, 1846, within twenty-one days from the date of the decree. Reserve further directions and costs.

August 3rd.—The Company petitioned for a re-hearing before the Lord Chancellor, and did not issue their warrant to the sheriff.

The *Solicitor-General* and Mr. *J. H. Law* moved for the four-day order to enforce the decree.

Mr. *Wood* and Mr. *Grove* opposed the motion, on the ground of the pendency of the appeal.

The VICE-CHANCELLOR said that the Company should have applied to stay the proceedings, if they had desired to delay the execution of the decree.

Order made.

1848.—*Rawlins v. Moss*.

**RAWLINS v. MOSS.*

[*604]

1848: 1st, 2nd, and 3rd June.

A plea to a bill of revivor, by the representatives of a deceased defendant, that the party whom they represent was never served with a subpoena to appear and answer, and did not appear to nor answer the original bill, overruled, as insufficient in substance—not excluding the fact that the deceased party might by other means have been bound by the proceedings in the original cause.

THIS was an amended bill of revivor, which stated, that in June, 1834, the plaintiffs exhibited, their original bill against John Moss, S. G. S. Jackson, (since deceased,) and Mary his wife, and other persons, praying an account of moneys received by the defendant Moss, and another on account of a certain trust fund, and the appointment of a new trustee in the place of Moss; that the said defendants being duly served with the subpoena to the said bill, severally appeared; that until the time thereafter mentioned, Messrs. Mously & Son, of Derby, and their agents, Messrs. Few, Hamilton & Few, were and acted as the solicitors and agents of S. G. S. Jackson and Mary his wife, and afterwards for the said Mary Jackson, widow. The bill stated the decree in the cause directing accounts to be taken, and the Master's report of the 5th of February, 1844, "whereby he certified, as the fact was, that he had been attended by counsel and solicitors for the several parties interested" in the said matters so referred to him. The bill then stated the order of the Court of the 23rd of December, 1845, upon exceptions to the report, "no one appearing for S. G. S. Jackson and Mary his wife, although they had been duly served with the order for setting down the exceptions, as by affidavit appeared." The bill also stated an order of the 11th of June, 1847, whereby the order of the 23rd of December, 1845, was affirmed, and by consent it was referred to the Master to ascertain in what shares and proportions the parties were entitled to the said trusts moneys, and whether the defendant John Moss was entitled to any charge or claim against any or either of the parties so entitled. The bill then stated the order, on further directions, of the 19th of *July, [*605]

1848.—*Rawlins v. Moss*.

1847, directing other inquiries; the payment by Moss of moneys into court, in pursuance of such order; and that, before the Master had made his report, the said Mary Jackson died, having by her will appointed Moss her executor; that Moss renounced probate; and that letters of administration, with the will annexed of the goods, chattels, and credits of Mary Jackson, deceased, had been duly granted to the defendant Ann Moss, who thereby became and was the sole legal personal representative of Mary Jackson.

The bill alleged pretences by the defendant Ann Moss, that neither Mary Jackson nor any solicitor on her behalf ever appeared in the said suit, and that the proceedings were carried on without the knowledge of, and without notice to, any solicitor acting for her, whereas the plaintiff charged the contrary, and that by an order of the 9th of December, 1846, made by the Master of the Rolls, on the petition of the said Mary Jackson, leave was given to change her solicitors in the said cause, by appointing Messrs. Gregory & Co., of Bedford Row, as such solicitors, instead of Messrs. Mousley & Son, and such solicitors were changed accordingly.

The bill prayed that the suit might be revived against the defendant Ann Moss, and put in the same state and condition as the same was in before the death of the said Mary Jackson.

The defendant Ann Moss put in a plea to the bill of revivor, and thereby averred, among other things, that S. G. S. Jackson and Mary his wife did not appear to the original bill therein mentioned, and that all the proceedings in the said cause had been taken without any appearance by them or either of them, and that no subpoena to appear and answer the said [*606] original bill was ever served upon them, and that they never put in any answer thereto, and that the decree was obtained and proceedings taken in the absence of S. G. S. Jackson and Mary his wife; that S. G. S. Jackson and Mary his wife were, from the time of the institution of the suit until their respective deaths, resident within the jurisdiction, and that neither of them was in contempt of the Court; that Messrs. Mousley and Messrs. Few, Hamilton & Few were not the solici-

 1848.—*Rawlins v. Moss*.

tors and agents of S. G. S. Jackson and Mary his wife, or of the said Mary, and that the said Master had not been attended by counsel or solicitors for them or either of them; that Mr. W. E. Mousley, of Derby, solicitor, and his son, assumed to act in the said cause as solicitors for S. G. S. Jackson and Mary his wife, and afterwards for the said Mary Jackson, but they had not, nor had Messrs. Few, Hamilton & Few, any authority to act as such solicitors, as appeared by a certain correspondence therein referred to; and that the said order to change her solicitors was obtained in order to put an end to such assumed authority. The bill also averred, that the said Mr. W. E. Mousley attempted to obtain such authority from S. G. S. Jackson and Mary his wife, but did not obtain the same, and that the said Messrs. Mousley & Son, and Messrs. Few, Hamilton & Few, had been and were the solicitors and agents of the plaintiffs in the said cause. The plea also set forth, by way of averment, a former plea to the bill of revivor before it was amended. The plea was set down for argument.

Mr. *Spence* and Mr. *Webster*, in support of the plea, relied upon *Asbee v. Shipley*,^(a) *Crowfoot v. Mander*,^(b) and *Stewart v. Nicholls*.^(c)

*The *Solicitor-General* and Mr. *Wright*, for the plain- [*607]
tiffs.—The plea is bad, both in form and substance :
in form, as tendering several distinct issues. It is not a plea of one fact, which, if true, would be a defence, supported by averments leading to the same issue, but it is a plea of a number of independent facts,—that the defendants were not served with the subpoena, did not appear, were not in contempt, that certain persons were not their solicitors, and that certain persons assumed to act as their solicitors without authority. On the fact of the authority, the plea, instead of setting out the letters referred to, draws a conclusion as to their result, and refers to the letters as sustaining it. Such a form of pleading cannot be permitted; if it

(a) 6 Madd. 296.

(b) 9 Sim. 396.

(c) 1 Tam. 312.

 1848.—*Rawlins v. Moss*.

were, a defendant, without pledging himself to a particular fact, might plead the fact "as appearing" in certain other documents; the plea of the fact might be allowed, but when the documents are produced, they might fail in proving the fact. The plea is bad in point of substance; for if any or all the averments were true, the testatrix, Mary Jackson, may still be bound by the proceedings in the cause, and the plaintiffs may be entitled to revive. In fact, it appears by the bill and plea that the testatrix was named as a party, and that decretal orders have been made in the suit, by which she was bound so long as the orders stand, even supposing those orders were irregularly made, and that she was, or that her representatives are, in that case, entitled to set them aside.

Mr. *Spence* in reply.—The averments are introduced to exhaust every circumstance which could have the effect of giving force to the proceedings in the original suit, as against Mary Jackson. They all tend to the same fact, that nothing has been done to make her a party. It is not informal to plead a fact, and refer to extrinsic matter for its proof. If the proof [*608] should fail, the plaintiff obtains his relief by the replication to the plea, when the truth of the plea is put in issue. He also cited *Devaynes v. Morris*, (a) 2 Dan. Ch. Pr. 1422, 1423.

VICE-CHANCELLOR, without expressing any opinion on the objections as to the form of the plea, said, that the fact that the late defendant Mary Jackson had not appeared in the suit, was not of itself conclusive on the question, whether the deceased party was bound by the proceeding in the cause. In order to sustain a plea, the defendant should have shown, not only that the deceased defendant had not entered an appearance, but that there had been neither act nor acquiescence on her part, nor any other circumstance by which she was bound by the former suit. The averments in this respect were very imperfect.

Plea overruled.

(a) 1 Myl. & Cr. 213.

1847.—Miller v. Smith.

MILLER v. SMITH.

[*609]

1847: July 8th.

Upon the motion of B, the Court ordered that, upon his paying the purchase money into Court, he should be substituted as purchaser in the place of A., and that A. thereupon should be discharged from his purchase. B. having omitted to draw up the order, the plaintiffs in the cause did so, and caused a direction to be inserted for payment of the purchase money by B. within twelve days after service of the order, in which form, (after notice to B. to attend at the Registrar's office,) the order was passed. On the motion of B., the Court discharged the order, with costs.

At a sale under a decree, in September, 1846, Harper became the purchaser of a messuage for 555*l.*; the purchase money to be paid on the 24th of December. The purchase was confirmed by an order of the 8th of February, 1847. On the 22nd of May, upon the motion of Waller, it was ordered that upon Waller paying into Court the sum of 555*l.*, the said purchase-money, with interest according to the conditions of sale, he should be substituted as the purchaser for Harper, and Harper should thereupon be discharged from the said purchase.

The order of the 22nd of May was not drawn up, and on the 12th of June a motion by the plaintiffs, "that Waller might be ordered, on or before the 22nd of June, to pay into Court the said sum of 555*l.*, with interest, according to the conditions of sale," was refused, with costs. The plaintiffs then proceeded to draw up the order of the 22nd of May, and—after notice had been given to the solicitors of Waller to attend at the Registrar's office on passing the order, which they did not do,—on the 28th of June, the order of the 22nd of May was passed, containing, in addition to the direction for the substitution of Waller for Harper, an order that Waller should pay in the purchase-money within twelve days after the service of the order. The order so drawn up was served on the 1st of July, and Waller thereupon gave notice of motion that it might be discharged.

Mr. Rolt and Mr. Younge, for the motion.

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1847.—*Miller v. Smith.*

[*610] **Mr Romilly and Mr. Willcock, contra.*

The VICE-CHANCELLOR said, that the common form of proceeding, after the substitution of a purchaser, was to proceed against the substituted party in the same manner as the plaintiffs would have done against the original purchaser. The order might have been defective in not fixing a time for the payment of the purchase-money: it appeared that the attention of the Court had not been called to that point. In drawing up the order the plaintiffs might either have taken it as pronounced by the Court, or might, by consent of the purchaser, have inserted a time for the payment of the purchase-money. A time not having been named when the order was pronounced, it was not competent for the Registrar, or either party, to fix the time. The notice to attend at the Registrar's office on passing the order was immaterial for the present purpose, for that could not amount to anything more than a notice that the order would be passed as it was pronounced, and not that a different order would be delivered out.

Order discharged, with costs.

1849.—Hart v. Tulk.

*HART v. TULK.

[*611]

1849: February 10th.

Leave to serve notice of motion upon defendants before their appearance in the cause, does not include also leave to give short notice of the motion; and if other than the regular period of notice be given, leave for that purpose must be obtained, and will not be implied from the distance of the place of service.

An order made upon notice for leave to the plaintiffs to amend their bill, giving security to the Clerk of Records and Writs for the costs of the defendants of the suit, already incurred, was varied *ex parte* by directing the costs of the defendants to be taxed and paid to them by the plaintiffs, reserving the question how they were ultimately to be borne; the variation not being such as could prejudice the absent defendants.

An order made by the Court, and correctly drawn up, will not in all cases be discharged solely on the ground that it was passed by the Registrar, without notice to the other parties in the cause.

Where there were two suits for administration, and a motion for a receiver, in each suit came on upon the same day, the receiver was appointed in both suits, and the Court gave the carriage of the order to the plaintiffs by whom the first notice of motion for the receiver had been given.

Special leave given to the plaintiffs to move for liberty to amend their bill, by striking out the name of one such plaintiffs and making him a defendant:—*Held* to authorize a motion by such of the parties as were to remain, excluding the plaintiff whose name was to be struck out; and the Court made the order, without prejudice to a motion then pending, for a receiver in the original cause.

Service of the subpoena to appear and answer a bill of revivor and supplement, upon defendants residing out of the jurisdiction (in Italy,) ordered to be substituted by service upon the solicitors appearing and acting for such defendants in the original suit.

THE testator devised his estate to executors and trustees appointed by his will, and died the 19th of January, 1849. The executors and trustees renounced and disclaimed, and administration with the will annexed was granted to a son of the testator. A suit (*Ley v. Tulk*) was instituted by some of the parties interested under the will, praying an administration of the estate, and a receiver; and this suit was afterwards instituted by other parties for the execution of the trusts of the will, praying also a receiver, and alleging that the Christmas rents had not been received, and that some incumbrancers on the estate threatened forthwith to take possession, or otherwise proceed for the re-

1843.—Hart v. Tulk.

covery of their mortgage debts, unless a receiver should be forthwith appointed. The plaintiffs, upon filing their bill, applied to the Lord Chancellor for leave to serve the defendants with notice of motion for a receiver in the cause, before their appearance, and at the time of serving them with the subpoena to appear.^(a) This application was made on the 5th of February, in vacation, and his Lordship gave the leave to serve the notice for the 8th of February, being the first motion day in the sittings after Hilary Term. Owing to the residence of some of the defendants at a considerable distance from London, the notice was not given until the 6th of February.

[*612] *Mr. Wood and Mr. Daniel, for the defendants, who were plaintiffs in the first suit, objected, that the leave given by the Lord Chancellor to serve the notice of motion before the appearance of the defendants did not enable the plaintiffs to give short notice of motion. The defendants were entitled to two clear days, as in ordinary cases.

The *Solicitor-General* and Mr. Moxon, for the motion, submitted that the leave must impliedly enable the party to serve the notice when it was practicable to do so. The leave was given by the Lord Chancellor in the afternoon of the 5th of February, and it was impracticable to serve defendants in a distant part of the country until the following day.

The VICE-CHANCELLOR allowed the objection, and said that short notice of motion could not be regularly given, without express leave for that purpose.

The motion was ordered to stand over, and (it being suggested that some conflict of interest might arise between the co-plaintiffs) liberty was given to the plaintiffs to apply to the Court to amend their bill, by striking out one of the plaintiffs and making him a defendant.

(a) See *Meaden v. Sealey*, *infra*, p. 620.

 1849.—Hart v. Tulk.

Feb. 16th.—The *Solicitor-General* and Mr. *Maxon* moved, on behalf of all the plaintiffs except one, that they might be at liberty to amend their bill by striking out the name of that *plaintiff and making him a defendant, giving security [*613] for the costs already incurred, and without prejudice to the motion for the receiver. They referred to *Brown v. Sawyer*, (a) *Wilson v. Wilson*, (b) *Witts v. Campbell*. (c)

Mr. *Wood* and Mr. *Daniel* opposed the motion, on the ground that the leave to move had been given to all the plaintiffs, and the motion was not made on behalf of all. They also objected to the form of the order to amend as asked for, so far as it was sought to be without prejudice to the pending motion for the receiver, which had been made in the cause while in its original form.

Feb. 19th.—The VICE-CHANCELLOR made the order; the costs of the motion to be paid by the plaintiffs.

The order had been drawn up directing the security to be given to the clerk of records and writs. (d)

Mr. *Maxon* applied *ex parte* for a variation of the order, by allowing the plaintiffs to pay the costs, reserving the question how they might ultimately be borne. He stated that the costs of the defendants of the suit would be under 60*s.*, and the expense incurred in settling *and giving the security [*614] would be greater than the amount of the costs to be secured.

The VICE-CHANCELLOR varied the order accordingly.

Feb. 26th and 27th.—Two motions, one the motion for the appointment of the receiver in this cause, and the other a motion for the appointment of the receiver in the other cause, (*Ley v. Tulk*,) were made.

(a) 3 Benv. 598.

(b) 1 J. & W. 457.

(c) 12 Ves. 492.

(d) General Order III. of 26th of October, 1842.

1849.—Hart v. Tulk.

The VICE-CHANCELLOR directed the receiver to be appointed in both causes, and that the plaintiffs in this cause (by whom the first notice of motion for the receiver had been given) should have the carriage of the order.

March 1st.—The order of the 16th of February, as varied on the 19th of February, was passed, under circumstances which are stated in the judgment below.

Upon the application of

Mr. *Wood* and Mr. *Daniel*, on behalf of the defendants, by motion to discharge the order, as varied on the 19th of February,—

March 5th.—VICE-CHANCELLOR:—This was an application [*615] to discharge an order, which, *as drawn up, gives the plaintiffs leave to amend their bill by striking out the name of one plaintiff and making him defendant, upon the terms of the plaintiff paying the costs of the motion upon which the order was made, and the costs of the suit up to the time of the amendment, reserving the question, how they are ultimately to be borne. These costs, I may observe, are stated, and not denied, to be under 60s. The grounds of the application were two:—First, that the order pronounced by the Court required the plaintiffs to give security for the costs of the suit, and not to pay them; and, secondly, that the order was passed without notice to the defendant.

The explanation of the first ground of objection is this,—the order for leave to amend was pronounced on the 16th of February, and the terms upon which it was made were, as the defendant correctly alleges,) that the plaintiff should pay the costs of the motion, and give security for the costs of the suit up to the time of the amendment.

On the 19th of February the plaintiff applied *ex parte* for leave to pay money into Court, or pay the costs of the suit to the defendant, instead of giving security. The grounds for this appli-

1849.—Hart v. Tulk.

cation were the smallness of the amount of the costs for which security was to be given, and the fact that the expense of giving the security would probably exceed the amount of costs. The propriety of making the order *ex parte* was considered. I found, on inquiry, that the practice of the Court in motions of that nature was (indifferently) to require security to be given, or to require money to be paid into court, or the costs to be paid; and as the order for actual payment of the costs would not be less beneficial to the defendant, I thought the amount of costs was so small, I ought not to put the defendants *to the expense of giving the security or bringing the [*616] parties before the Court, to consider whether an order more favorable to them might not in such a case be substituted. In doing this, I did no more than exercise a common discretion in the case of orders made upon affidavit of service, where the Court sees that a variation of the letter of a notice of motion cannot possibly operate to the prejudice of the absent party.^(a) I do not think I ought to discharge the order upon this ground alone, and this is the only ground of merits for discharging the order complained of.

Being of this opinion, the second ground for the present application is immaterial, so far as the parties are concerned. But it requires consideration on my part, because it involves a question of general practice.

The Registrar, who passed the order, was satisfied at the time that he was justified in doing so, without requiring notice to be served on the defendants, and he remains of the same opinion. Three others of the Registrars, of the greatest experience, are of that opinion also; as is another gentleman in the office of Records and Writs, of great practical experience, who has given me the benefit of his opinion. These opinions are founded upon the practice which has at all times prevailed in the Registrar's office, of allowing a discretion to those officers of passing orders of a simple kind without notice where it is manifest that the absent party cannot be aggrieved by the order as drawn up. All are

(a) See *Hutton v. Hapworth*, *supra*, p. 315.

1849.—*Hart v. Tulk.*

of opinion that the business of the Court in the Registrar's office will be prejudicially interfered with, if I were to decide this case upon the abstract principle, that in no case, except in matters of course, can an order stand, however accurately [*617] *drawn up, if passed without notice, however simple the order might be, and however impossible it may be for the parties complaining to show that such simple order as drawn up, is in any respect improper. In this case, no attempt has been made to show that the order of the 16th, as varied by me on the 19th is not correctly expressed in the order complained of; and the senior Registrar informs me, that he recollects Lord Lyndhurst having refused to discharge an order correctly drawn up, only upon the ground that it had been passed without notice. In this case it is too plain for argument, that the parties in the cause have not a scintilla of interest in the result of this motion. Up to the time of the order for appointing the receiver in this cause, and in the cause of *Ley v. Tulk*, I thought the parties might possibly believe, (although I am sure that belief was unfounded) that it was material to their interest that the receiver should be appointed in both causes. But when that point was gained, it is impossible that any one can seriously argue that the parties in the cause have any interest in the question by whom the order appointing the receiver is carried into the Master's office. Yet, in answer to a question from the Court what interest the defendants had in seeking to discharge the order complained of, the answer was, that it would enable the defendants in *Hart v. Tulk* (the plaintiffs in *Ley v. Tulk*) to get rid of the order appointing the receiver, (the object of all the parties in both causes,) the only objection to which is, that the carriage of that order was given to the plaintiffs in this cause; which was done because I had nothing to guide me as to that but the priority of the motions.

I regard this motion as purely litigious, and I will not, in a case circumstanced as this is, as to the amount of costs [*618] incurred up to the time of the amendment and *otherwise, decide as an abstract proposition, that no orders,

 1849.—Wallis v. Darby.

except orders of course, can possibly stand, only because they are passed by the Registrars without notice.

April 18th.—Mr. Moxon moved, that service of the subpoena to appear and answer to the bill of revivor and supplement in this cause, on Messrs. D., K., & D., who had acted as solicitors of the defendants H. Cottrell and Sophia his wife, and Alice Cottrell, in the original suit, might be deemed good service upon the said defendants. The defendants were residing in Italy, and Messrs. D., K., & D. had refused to undertake to appear for them in the suit. He referred to *Norton v. Hepworth*.(a)

The VICE-CHANCELLOR made the order.

WALLIS v. DARBY.

1849: March 19th and 20th.

Where a bill of revivor and supplement was filed by one of two plaintiffs, and the other plaintiff refusing to join, was made a defendant, and an appearance entered for him under the XXIXth General Order of May, 1845, and such defendant afterwards obtained and served an order changing his solicitors in the cause,—the Court, upon an application by the plaintiff, supported by affidavit that diligent inquiries had been made for such defendant, but he could not be found, ordered, that service upon the new solicitor named in the order for changing solicitors, of a copy of the traversing note, should be deemed good service upon such defendant.

CHRISTOPHER and Ann Wallis were plaintiffs in the original suit. The suit abated by the death of one defendant and the marriage of another. Ann alone *filed her bill [*619] of revivor and supplement, and Christopher refusing to join as plaintiff, was made a defendant. Christopher not having appeared to the bill in due time, after personal service of the subpoena, an appearance was entered for him by the plaintiff,

(a) 1 Hall & Twells, 158; S. C., 1 Mac. & Gor. 54.

1849.—Wallis v. Darby.

and after the proper time for putting in his answer had expired, without answer the plaintiff filed a traversing note, and the Court gave her leave to serve the defendant Christopher personally with a copy of the traversing note.(a) Christopher then obtained and served on the plaintiff an order intituled both in the original and in the supplemental and revived causes for changing his solicitors; but took no further step towards making the substitution. Negotiations afterwards took place between the plaintiff's solicitors and the new solicitors of the defendant Christopher, with reference to putting in his answer, but without result.

Upon affidavit of diligent inquiries having been made for the defendant Christopher, in the neighborhood from which a letter lately received from him had been dated, but without effect, and that his new solicitors had admitted that they were in communication with him, but stated that they could not give the plaintiff his address nor accept service of the traversing note,

Mr. *Moxon* now moved, that service of a copy of the traversing note on the new solicitors of the defendant Christopher might be deemed good service upon him; and

The VICE-CHANCELLOR, adverting to the case of *Norton v. Hepworth*(b) and *Murray v. Vipart*,(c) made the order.

(a) See *Moss v. Buckley*, 2 Ph. 628; *Laurie v. Burn*, supra, p. 308.

(b) 1 Mac. & Gor. 54; S. C., 1 Hall & Twells, 158.

(c) 1 Ph. 521.

1849.—Meaden v. Sealy.

*MEADEN v. SEALEY.

[*620]

1849: March 28th.

Upon the bill of an equitable mortgagee, leave was given to serve the defendant, the mortgagor, before appearance, with notice of motion for a receiver, (the bill not asking for an injunction;) and the order was made, upon affidavit of service, for the appointment of the receiver, with liberty to the parties to propose themselves, according to the notice.

THE plaintiff, an equitable mortgagee of houses, several of which were unfinished, and others unoccupied, filed his bill for payment of his mortgage-debt, or foreclosure. The plaintiff, upon filing the bill, obtained leave to serve the defendant, before appearance, with notice of motion for a receiver.

The bill and affidavits stated, that a sum exceeding 2000*l.* was due to the plaintiff upon the mortgage security; that the defendant, the mortgagor, had not for upwards of six months made any payment to the plaintiff on account of principle or interest; that the security was scanty or insufficient; and that, by an outlay of about 90*l.* or 100*l.* several of the houses might be completed and rendered fit for habitation. The notice of motion asked that the plaintiff and defendant might be at liberty to propose themselves for receiver, and that the receiver might be at liberty to expend such moneys as might be necessary, not exceeding 100*l.*, in making the houses fit for habitation.

On the motion being made upon affidavit of service, the defendant not appearing,

The Registrar suggested to the Court, that orders for the appointment of a receiver were not, in practice, made before the appearance of the defendant: *Coward v. Chadwick*.(a)

Mr. *Hare*, for the motion, submitted, that where an *injunction was awarded, although, before appearance, [*621]

1849.—Meaden v. Sealey.

it was the common practice to appoint a receiver: the injunction and receiver were applicable to different circumstances; the former, where a defendant had done, or threatened to do, what was inequitable or illegal; the latter, (where there had been no prior wrong,) for the mere protection of property pending litigation. Many cases might occur (like the present) in which it would be proper to apply for the receiver, without the injunction.

The VICE-CHANCELLOR said, that the state of the security made it proper to appoint a receiver; and the circumstances showed a case of urgency. In the case of *Tanfield v. Irvine*,^(a) the Court had appointed a receiver, on the application of an annuitant whose annuity was secured by an equitable charge on the land, not only where the grantor of the annuity had not appeared, but where he had not been served with the subpoena.^(b)

The order was made for the appointment of the receiver, with liberty to the parties to propose themselves; but without any direction as to the proposed outlay for completing the houses.

(a) 2 Russ. 149.

(b) See *Hart v. Tulk*, *supra*, p. 611.

 1849.—Hepworth v. Heslop.

*HEPWORTH v. HESLOP.

[*622]

1849: April 26th and 27th.

After an issue had been directed, (upon exceptions to the Master's report of debts in a creditor's suit,) to try the consideration of a bond, the Court refused the motion of the plaintiff, the obligee in the bond, that he might be ordered to be examined and cross-examined by the respective parties, on the trial of the issue.

Whether, generally, any of the parties, not being a merely formal party, can be examined as a witness on the trial of an issue, directed at the hearing of the cause, *quære?*

Whether the Court will, after an issue has been directed, order a party to be examined as a witness on the trial of the issue, without re-hearing the matter in which the order directing the issue was made, *quære?*

A MOTION on behalf of the defendant, John Heslop, the executor, (who was the plaintiff in the issue directed in this case, on the question of the consideration of a bond,) (a) that the said John Heslop, the plaintiff in the issue, might be examined and cross-examined by the respective parties, on the trial of the issue.

Mr. Wood and Mr. Parker, for the motion.—The agreement for the salary, which was the consideration of the bond, was made between the testator and his son; and the son is the only person who is able to give evidence of the facts. The examination of a party has been in many cases directed by the Court: *De Tastet v. Bordenave*, (b) *Harwood v. Harwood*, (c) *Gardiner v. Rowe*, (d) and *Milner v. Singleton*; (e) and the Lord

(a) See *Hepworth v. Heslop*, *supra*, p. 561.

(b) Jacob, 516.

(c) Cited 4 Madd. 236.

(d) 4 Madd. 236.

(e) *Milner v. Singleton*, V. C., July 14, 1840.—This cause coming on the 9th, 10th, 11th, and 13th days of July, and also this present day to be heard, &c.:—"This Court doth order that the parties do proceed to trial at the next Spring Assizes to be holden for the county of York, or at such other time as the Judge of the Court shall appoint, upon the following issues:—namely, whether, on the 21st day of April, 1635, it was agreed and determined, between the plaintiff and the said defendant, that the said defendant should negotiate the purchase of a lease for three lives, for the plaintiff, from William Cockburn, in the pleadings named, at the

 1849.—Hepworth v. Healop.

[*623] *Chancellor does not disapprove of such a course, in *Parker v. Morrell*,^(a) The evidence of the obligee would be received if the bond were to be proved in bankruptcy; and the administration of the assets of a deceased person is analogous to the distribution of an estate of a bankrupt. The legislature has, in late times, greatly restricted the objections to evidence on the ground of incompetency, (6 & 7 Vict. c. 85,) and has very recently enacted, that the parties themselves may be examined in proceedings for the recovery of debts under, 20th, (9 & 10 Vict. c. 95, s. 83.)

The *Solicitor-General* and Mr. *Willcock* opposed the motion.—The few cases in which the examination of a party to an issue has been directed by the Court have been (with the exception of *Milner v. Singleton*) cases of *interlocutory applications: 2 Dan. Chanc. Prac. 1065, Head. ed. It was refused in *M'Gregor v. Bainbrige*,^(b) the case of an issue

cheapest rate he could, below 9000^l; and the said defendant also agreed with the plaintiff to lend and advance to the plaintiff one-half of the purchase money, which it was supposed would amount to 4200^l. or 4300^l, or thereabouts, the plaintiff paying 200^l. a year by way of interest for the same; and, secondly, whether it was agreed, on the said 21st day of April, 1835, that the defendant should purchase, or negotiate the purchase, of the lease of the farm in question, as agent for the plaintiff: and at such trial the plaintiff here is to be plaintiff at law, and the defendant here is to be defendant at law, who is forthwith to name an attorney, &c. The master to settle the issues if the parties differ; and, in order thereto, the parties are to produce before the said Master, as he shall direct, on oath, all books, papers, and writings in their custody, possession or power, relating thereto: and at such trial *both the plaintiff and defendant are to be examined*; and each party is also to call his own witness examined in this cause; and the parties are to be at liberty to use the depositions of any witness examined in the cause, who may be proved, to the satisfaction of the judge, to be dead, or unable to attend the trial; and if any special matter should arise, the same is to be indorsed on the postea; and after such trial the parties are to be at liberty to resort back to this Court, as to the equity hereby reserved, and as to the costs of this suit. Liberty to apply." Reg. Lib. 1839, fo. 1205.

See also, *Peacock v. Peacock*, L. C., Nov. 18, 1808, Reg. Lib. 1808, fo. 31; and see the motion for the receiver, reported 16 Ves. 56.

(a) 2 Ph. 460.

(b) V. C. Wigram, 15th July, 1818.—The motion was, that the plaintiff and defendant might be at liberty to examine each other. The application was made

1849.—Hepworth v. Heslop.

directed on the question of partnership between the solicitors of a railway company. In *Howard v. Braithwaite*, at the hearing of the cause, Lord Eldon said, that the parties could not be allowed to examine each other without consent.

VICE-CHANCELLOR:—At the hearing of this case I directed an issue, in which the defendant was materially interested. The issue was such as to require that the defendant in equity should be plaintiff at law, and to throw on him the onus of proving the fact to be tried on the issue. I did not, at the hearing of the cause, direct the parties, or either of them to be examined. This is, in effect, an application by the defendant himself to be examined on the issue as a witness for himself. The application is not that the parties may be at liberty to examine each other. If the order were made in that form, I very much doubt whether any useful result would follow from it.

The defendant asks me to direct that he may be examined and cross-examined—meaning, as I understand it, that he may be examined in support of his own case, giving the other party in the issue the liberty to *cross-examine [*625] him. A direction of this kind, if admissible, should have been asked at the hearing, for it must or may depend upon very nice questions, whether it ought to be done. After the case has been heard and disposed of, the Court is hardly in a position to decide a point of such importance as this, without a re-argument of the case.

Supposing the Court now to be in a position to make the order, the question is, ought I to make it? The rules of evidence are the same in equity as at law. A Court of equity no more trusts a party as a witness in his own cause, than a Court of law does, except in very extraordinary cases. But it was said, that, if the Court ever makes such an order, it would not refuse to do it in this case. This Court does it, certainly, in some cases in bankruptcy, for which a reason may be found in

several weeks after the hearing of the cause, when the issue was directed; and the Court refused the motion, holding that the order, if proper, ought not to be made, unless upon a re-hearing of the cause.

 1849. —Hepworth v. Healop.

the peculiar manner in which justice is administered in bankruptcy, and which distinguishes that case from the administration of justice between parties in a cause. It has also been done in causes. But, as far as my experience goes, (with the exception of *Milner v. Singleton*,) it has not been done in causes, except upon interlocutory applications. I am not aware of any authority which expressly makes that distinction; but the judgment in *De Tastet v. Bordenave* points to the distinction. Upon interlocutory applications, the Court has not to decide the right, but simply whether it will or will not protect the property until the right shall be determined. For that purpose the Court receives the affidavits of the parties; and, if the evidence be nicely balanced, the Court, if it cannot determine between the affidavits, sometimes sends the question to a jury, not, as I have intimated, to decide the right, but to decide whether there is a case for the Court to take upon itself the protection of the [*626] property, pending the suit. In **Gompertz v. Ansdell*,^(a) where an issue was directed to try the very question in the cause, the Lord Chancellor afterwards decided that it was competent to the parties to go into fresh evidence in the cause, notwithstanding the verdict.

In *Milner v. Singleton*, the Vice-Chancellor directed an issue, and also directed the plaintiff to be examined, which gave him an opportunity of being a witness in support of his own interest. Upon appeal to the Lord Chancellor, embracing both points—*first*, that no issue ought to have been directed; and, *secondly*, that if it were, that particular direction in the issue was improper—the defendant was the appellant. The Lord Chancellor allowed the issue to be tried, and made no alteration in the order. But I perfectly recollect, that, at the time when the Lord Chancellor gave his judgment, he did not notice the second point. The plaintiff in that case succeeded upon his own evidence. I have referred to that case, and also to *Parker v. Morrell*, and I do not think that what was done in *Milner v. Singleton* can be a precedent for another case. There were very

(a) 4 My. & Cr. 449.

1849.—*Hepworth v. Healop.*

special circumstances. I am satisfied, from what the Lord Chancellor said, in *Parker v. Morrell*, that he did not consider that any such general proposition as the defendant has contended for was established by the case of *Milner v. Singleton*. I do not think that this is a case in which I ought to make the order.

I was pressed with an analogy that might, it was said, be taken from the recent acts of Parliament, by which the legislature has enabled parties to have the benefit of their own testimony. If, in certain cases, that be made the law, I am bound to follow it. But the fact, that *in cases of [*627] small amount, in local Courts, parties are allowed to give evidence in support of their own interests, is rather an argument against than for the practice in other cases. It may be true that there are cases in which the parties have no evidence of their rights but that which their own statements, if received, would afford; and it may be also true that parties in such circumstances sometimes fail from want of evidence. But that consequence is not alone a sufficient ground for dispensing with the general rule, by which neither the plaintiff nor the defendant, in civil cases, can be a witness on his own behalf.

I do not mean my observations to apply to the case of formal parties merely; nor do I mean to say that cases may not arise in which the Court would, at the hearing, upon directing an issue, direct one party to be examined, if the other party thought proper to examine him; but in such cases the direction is given, not that the party to be examined may have the benefit of his own evidence, but in order that another party may have an opportunity of testing, by a cross-examination, the truth of the statement in the answer of his opponent. This was a course which appeared to me to be proper in *Freeman v. Tatham*.(a)

Motion refused, with costs.

(a) 5 Hare, 342.

 1847.—*Fisher v. Fisher.*

[*628]

*FISHER v. FISHER.

1847: April 15th and 21st.

The Court will not make an order permitting a plaintiff in an original bill, who has subsequently become bankrupt or insolvent, to be examined as a witness in the cause for the assignees of his estate, who are prosecuting his suit by supplemental bill.

MR. JAMES RUSSELL and Mr. Sidney Smith, for the assignees of an insolvent, the plaintiffs in a bill of revivor and supplement, moved that they might be at liberty to examine as a witness, saving just exceptions, the insolvent, the plaintiff in the original suit, who had released his interest in the surplus.

Mr. *Bagshawe* opposed the motion.(a)

The VICE-CHANCELLOR refused the motion, and his judgment was affirmed by the Lord Chancellor;(b) but it has been thought useful, with reference to the question in the foregoing case, (*Hepworth v. Heslop*), to state the observations of the *Vice-Chancellor* in his judgment.

VICE-CHANCELLOR:—I will first consider this case, excluding the cases of *Hewatsan v. Tookey*,(c) and *Erwer v. Atkinson*,(d). That the question raised by their motion is one of form and expense only, is manifest. The assignees, though at liberty to adopt the insolvent's suit, are not bound to do so. They might have passed it by and instituted an original suit of their own, in which suit they might *clearly have examined the insolvent as a witness, saving just exceptions. Still, if the assignees have thought proper to adopt the insolvent's suit, they must take the consequences of doing so. The question here is, whether the exclusion of the insolvent's evidence,

(a) The cases cited, in addition to those referred to in the judgment, were *Benson v. Chester*, Jac. 577; *Edwards v. Goodwin*, 10 Sim. 123; *Head v. Head*, 3 Atk. 511, 547; *Maitreux v. Macleareth*, 1 Ves. jun. 141; and *Hawe v. Hand*, 2 Atk. 615.

(b) 2 Ph. 236.

(c) 2 Dick. 799.

(d) 2 Cox, 393.

 1847.—Fisher v. Fisher.

saving just exceptions, is a consequence of their doing so. That question appears to me to resolve itself into this—whether the insolvent at this time, and upon the pleadings, is, for any purpose, a party to the proceedings. If yea, cadit questio? if nay, my individual opinion would be, that the bankrupt or insolvent ought to be received as a witness for the plaintiffs in the supplemental suit.

First, as to liability for costs. The practice at the present day is, I believe, settled, i. e. that if a sole plaintiff becomes bankrupt or insolvent, and the assignees do not adopt his suit by supplemental bill, the bill will be dismissed, without costs: *Wheeler v. Malins*.(a) *Sharp v. Hullett*,(b) *Lord Huntingtower v. Sherborn*.(c) This was admitted by the defendant's counsel. The insolvent, therefore, does not remain a party for the purpose of answering any demand for costs.

Secondly, with respect to the interest of the insolvent in the result of the suit, it is admitted that all his interest in the suit is completely transferred to his assignees. Does he remain a formal party? That his name remains upon the record in the original suit—that all future orders and decrees will be entitled in the original and supplemental suits, does not appear to me to answer this question. The original cause having been instituted by *and in the name of the insolvent, his name must [*630] of necessity be used as a means of describing the original cause. But the question remains, whether that original suit is not completely merged in the supplemental suit, and the insolvent party as completely discharged from the proceedings as if the assignees had filed an original bill. Although, for the purpose of describing the original suit, the name of the insolvent will still be used, he will not be served with any of the proceedings, nor, in case he should die, will his representative be a necessary party to the future proceedings. My conclusion, in the absence of authority, would be, that he has ceased to be a party.

I do not, however, mean to go beyond the case before me, or

(a) 4 Madd. 171.

(b) 2 S. & S. 496.

(c) 5 Beav. 380.

1847.—*Fisher v. Fisher.*

to say what my opinion might be in some possible cases; as in cases where the bankruptcy is disputed, or otherwise brought in question.^(a)

The question remains, how far are these observations affected by the cases of *Hewatsan v. Tookey*,^(b) and *Ever v. Atkinson*.^(c) In the former case, Sir Lloyd Kenyon made an order similar to what is now asked; but the Lord Chancellor discharged it. I cannot, however, but think that the Lord Chancellor did so upon the ground suggested by Mr. Dickens, that the bankrupt remained a party, not in name only, but in substance, as being still liable for costs—a liability excluded by more modern authority.

In *Ever v. Atkinson* the three plaintiffs were partners, and all became bankrupt. The assignees prosecuted [*631] the suit, and applied for leave to examine one of the three bankrupts. The Master of the Rolls observing that the bankrupt was clearly a good witness, ordered that the original bill should be amended, by striking out the name of the bankrupt whom the assignees desired to examine as a plaintiff, and that the assignees should then be at liberty to examine him as a witness. The reporter says, the Master of the Rolls thought it the more regular course to strike out the name. I cannot do that in the present case, as there is only one plaintiff in the original suit; but the right to examine a plaintiff in such a case cannot depend upon the accident of whether there is one or more.

These two cases make the difficulty. If I were at liberty to act upon my own opinion of what might be safely and properly done, I should at once make the order. But as no case has occurred in which it has been made, although the circumstances are of common occurrence, I think that, if the order be now made for the first time, it should proceed from a higher authority than mine.

(a) See *Robertson v. Southgate*, 5 Hare, 223. (b) 2 Dick. 799. (c) 2 Cox, 393.

1849.—Green v. Briggs.

*GREEN v. BRIGGS.

[*632]

1849: June 18th.

In a suit between a part owner and managing owner of a ship and the mortgagees of the shares of other part owners, to determine the question of right to the freight and earnings of the ship, the same being claimed by the plaintiff towards the expenses of repairs and outfit preparatory to the voyage, and by the mortgagees as applicable, in the first instance, to the payment of their debt, the assignees of the mortgagors, the other part owners, were held to be necessary parties, and not to be entitled to their costs.

THIS cause came on for further directions. The Master found, that, after deducting moneys which the plaintiff had received, a balance of 17,778*l.* 13*s.* was due to the plaintiff in respect of all and every the sum and suma of money paid by him, or then remaining unpaid, and for which he was liable, for and in respect of the expenses properly incurred in repairing, refitting, and fitting out the ship *Thames*, in and after the month of June, 1840, and in the year 1841, previously to her sailing from London on the voyage or adventure in the pleadings, &c., and of all the expenses properly incurred in respect of the said ship, or of the said voyage or adventure, from the time when the said ship sailed from London in the month of July, 1841, down to the determination of the said voyage or adventure on her return to London in the year 1843. And the Master also certified, that he did not find that the defendants, Briggs, Thorburn, & Co., or either of them, had paid, or were or was then liable to pay, any sum or sums of money in respect of any such repairs, refitting, or outfit, or other expenses; and he found, that the moneys received for freight and earnings on the homeward voyage were less than the expenses of such homeward voyage by a sum of 112*l.*, and had been applied towards such expenses.

The *Solicitor-General*, Mr. Wood, and Mr. Palmer, for the plaintiff, asked for the decree for payment of the moneys in question; and that the defendant Briggs, Thornburn, & Co., might be ordered to pay the costs.

1849.—Green v. Briggs.

[*633] *Mr. *Walker* and Mr. *Cairns*, for the defendants, Briggs, Thorburn, & Co., submitted, that, having regard to the difficulty of the question, the Court would not give any directions as to costs, and certainly would not order the defendants to pay the costs of the co-defendants, the assignees of *Acraman & Co.*

Mr. *Osborne*, for the assignees, claimed to be paid their costs, as the costs of defendants who had been made parties, not in respect of any interest or claim of their own, but solely for the convenience of the other parties, and to enable them to obtain a decision on the question in dispute. The assignees had never resisted the plaintiff's claim: the suit had been entirely occasioned by the claims of Briggs, Thorburn, & Co., which the Court had held to be unfounded.(a)

The VICE-CHANCELLOR, adverting to the rule pursued by the Lord Chancellor, of ordering the costs to be paid by the party who is wrong,(b) held, that the defendants, Briggs, Thorburn, & Co., must pay the plaintiff his costs of the suit. The assignees of *Acraman & Co.*, the mortgagors, were necessary parties, on two grounds—first, from their interest in any surplus of the fund; and, secondly, because the amount due to the claimants on the fund was to be ascertained. The Court could not order the plaintiff to pay the costs of the assignees, nor could the mortgagees be decreed to pay them.

[*634] Let the defendant Robert Thorburn, on or before &c., join with the plaintiff in receiving the sum of 6246*l.* 9*s.* 4*d.*, in &c., or the cash, Exchequer-bills, and securities of which the same sum now consists, or whereon the same is now invested, together with all interest and accumulations thereon, or on any part thereof; and let the same, when so received, be paid to the plaintiff; and let the defendants, Briggs, Thorburn, & Co., on or before &c., also pay to the plaintiff the sum of 693*l.* 3*s.* 4*d.*, admitted to have been received by them; and the costs of this suit to be taxed, &c. Liberty to apply.

(a) In the report of this case, p. 396, the names of counsel appearing for the different parties are inaccurately stated. They should be represented as above.

(b) See 2 Ph. 545.

Memoranda.

*MEMORANDA.

[*635]

Andrew Henry Lynch, Esq., a Master in Ordinary of the High Court of Chancery, resigned his office on the 25th of March, 1847. The office, which thereby became vacant, was abolished by stat. 10 & 11 Vict. c. 60.

In December, 1847, *William Henry Tinney*, Esq., one of Her Majesty's Counsel, was appointed a Master in Ordinary, in the place of *Samuel Duckworth*, Esq., deceased.

In March, 1848, Sir *David Dundas* resigned the office of Solicitor-General. *John Romilly*, Esq., one of Her Majesty's Counsel, was appointed Solicitor-General on the 25th of the same month; and on the 4th of April following, he took the oaths of office, and afterwards received the honor of Knighthood.

In June, 1848, *Richard T. Kindersley*, Esq., one of Her Majesty's Counsel, was appointed a Master in Ordinary, in the place of Sir *Giffin Wilson*, Knight, deceased.

In the vacation after Trinity Term, 1848, *Arnold Wallinger*, Esq., was called to the degree of Serjeant-at-Law.

On the 28rd of February, 1849, *Edward Lloyd*, *John Greenwood*, *Richard Malins*, *Frederic Calvert*, *Henry Singer Keating*, and *Roundell Palmer*, Esqrs., were appointed of Her Majesty's Counsel.

On the 6th of March, 1849, *James R. Hope*, Esq., received a patent of precedence.



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ACQUIESCENCE.

A colliery proprietor constructed a railway from his colliery across the lands of several other persons by agreement, and his solicitors wrote a letter to the defendant, across whose lands he desired to carry the railway, referring to the powers of a local act of Parliament, supposed to enable him to take lands within a certain area for roadways, and offering on the

part of the plaintiff, to pay him for the land at a fair valuation. The defendant did not reply to the letter, and the railway was made across his land without further communication with him. A year or two afterwards the plaintiff and defendant had an interview, but did not agree as to the price to be paid for the land; and three or four years after the railway was made the defendant brought his ejectment, whereupon the plaintiff filed his bill for an injunction, charging acquiescence. The Court, on motion, restrained the action, upon the plaintiff giving judgment in the ejectment, and paying a sum into Court not less than the amount of the utmost valuation of the land. *Powell v. Thomas*, 300

See IMPROVEMENT, 1, 2, 3, 4.
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ADMINISTRATION SUIT.

1. The admission of an executor by his answer, in a creditor's suit, that he

had paid certain legacies bequeathed by the testator, is not an admission of assets entitling the plaintiff to a decree against the executor for payment of his debt without taking the account, when the bill does not specifically charge the defendant with having made himself personally liable, but prays that an account may be taken, and the estate administered in a due course of administration. *Savage v. Lane*, 32

2. Where a testator, in his lifetime, conveyed to trustees the mines and minerals under certain lands upon trusts for himself (the testator) for life, and after his death upon trust for sale, and out of the proceeds—first, to pay all his debts, so as to discharge his real and personal estate therefrom; secondly, to apply 3000*l.* to the purposes of his will; and, lastly, to divide the surplus among certain persons therein named—the persons to whom the surplus is thus given are proper parties to a creditor's suit seeking to follow the real as well as the personal estate of the testator; but the Court may, in its discretion, make a decree for administration in their absence. *Id.*

3. The circumstance, that a fund, in which a party takes a life interest under a will, is transferred by the executor to the trustees of that fund appointed by the will, is not necessarily and conclusively a severance of the fund from the bulk of the estate, unless the executor has, by such transfer, done all that it is incumbent upon him to do in the administration of the fund. *Pensington v. Buckley*, 451

4. Upon a transfer to trustees of a fund bequeathed to them upon trust to pay the interest to a tenant for life, without any bequest of the corpus, or with a bequest thereof of doubtful validity, and which upon construction might fail, so that the corpus would ultimately become part of the residuary estate, the trustees of such fund are not, ipso facto, trustees for the residuary legatees or the next of kin, but the corpus of the fund must be regarded as assets of the testator's estate unadministered ultra the testator. *Id.*

5. The circumstance, that the residue of the estate (omitting the fund so vested in trustees for the tenant for life) has been administered in equity, does not affect the principle; nor is it less applicable, because, from the time which has elapsed since the death of the testator, the executor is not a necessary party in

the administration of the particular fund, and has not been made a party to the suit. *Id.*

See RECEIVER, 3,

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See EXECUTOR.

ADMISSION.

See EVIDENCE, 1, 2.

ADMISSIONS.

See INJUNCTION, 3.

AFFIDAVIT OF SERVICE.

The application of a party by his counsel, for time to answer affidavits filed in support of a motion, whereupon time was given and affidavits filed, is not an appearance by that party on the motion entitling the other party to obtain the order on a subsequent motion day, without an affidavit of service—no counsel then appearing for the opposing party. *Hutton v. Hepworth*, 319

See ORDER, 1, 2.

AGENT.

1. The Factors Act (5 & 6 Vict. c. 39) applies to mercantile transactions, and not to the case of advances made upon the security of furniture used in a furnished house,—not in the way of trade,—to the apparent owner of such furniture, such apparent owner afterwards appearing to be the agent intrusted with the custody of the furniture by the true owner. *Wood v. Rouchiffe*, 191

2. Such "agent" is not an agent, nor is such furniture "goods and merchandise" within the meaning of the statute 5 & 6 Vict. c. 39. *Id.*

See BROKER.
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ALIEN.

1. A., who was by birth an Englishman, emigrated to the United States of America after the recognition of their independence by the Treaty of 1783, and took the oaths of obedience to the American Government, and of abjuration of all other allegiance,—married an American woman, and had a son of that marriage (B.) born in the United States. B. had a son (C.) who was also born in America, out of the Queen's dominions: *Held*, that C. was capable of inheriting real estate as a British subject within the statutes 13 Geo. 3, c. 21, and 4 Geo. 2, c. 21. *Fitch v. Weber*, 51

2. The abjuration by a British subject of his allegiance to the Crown, and his promise of obedience to a foreign state, although it might have rendered him liable, under the statute 3 James 1, c. 4, ss. 22, 23, to the penalty of high treason, does not therefore disqualify the children of such British subject from inheriting, in the absence of any attainder of such British subject by judgment, outlawry or otherwise. *Ib.*

3. The exclusion from the benefits of the statute 4 Geo. 2, c. 21, s. 2, of the children of fathers who at the time of their birth, were liable to the penalties of high treason or felony in case of the returning into this kingdom or Ireland without the royal license, is not to be construed as requiring the Court to determine incidentally, and in the absence of the party charged, that he has been guilty of treason or felony; but the exclusion must be construed as restricted to that class of offences in which the penalty is annexed to the fact of returning without license. *Ib.*

4. The privileges which the statutes 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, confer are the privileges of the children, and not of the father; and, therefore, acts intended by a British born subject to have the effect of acts of abandonment or abjuration of his rights in that character do not deprive his children of the benefit of the statutes of the 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, unless such acts bring them within the disqualifying provisions of those statutes. *Ib.*

5. A person claiming the benefit of the statute 13 Geo. 3, c. 21, does not lose that benefit only because he does not conform or qualify in the manner prescribed by sect. 3 of that statute, within

five years from the accruer of his right or interest. *Ib.*

ALIQOT SHARE.

See PARTIES, 3.

ALLEGIANCE.

See ALIEN, 1, 2.

AMENDMENT.

1. Where a cause is, at the hearing, ordered to stand over, with liberty to the plaintiff to amend by adding parties, and no further proceedings are taken, the proper course for the defendant is to move, upon notice, that the bill be amended within a certain time, or that it be dismissed; and not to move that it be dismissed simply. *Emerson v. Emerson*, 442

2. Under an order made at the hearing of the cause, giving the plaintiff leave to amend his bill, by adding proper parties, with apt words to charge them, or by stating reasons to show why particular persons should not be parties, or to file a supplemental bill, the plaintiff may amend by stating a grant of letters of administration to the estate of a deceased person to one who is already a defendant in the suit, and by expunging a statement which the bill originally contained, that the deceased person had died insolvent, and had no personal representative. *Bateman v. Margerison*, 502

See ORDER, 4.

AMERICAN TREATY.

See ALIEN, 1.

ANNUITY.

1. A bequest by the will of the testatrix of an annuity to her "servant," E. H., and a bequest by a codicil three years afterwards, of an annuity of the same amount to her "servant," E. H.—*Held* to be cumulative, the word servant not expressing the motive, but being descriptive only. *Roch v. Callen*, 531

2. Notwithstanding the principal question in the suit be the right of the plain-

tiff to two annuities, one of which only has been paid, the defendant, on a decree being made for the arrears of the unpaid annuity, cannot set up the Statute of Limitations as limiting the period of the account, if the benefit of the statute be not claimed upon the pleadings. *Id.*

3. An annuity given by a will, forming no charge upon land, but being personal only, is not within the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 42. *Id.*

See COVENANT.

VENDOR AND PURCHASER, 3.

ANSWER.

See DEMURRER.
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See PLEA, 2.
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SERVICE.

APPOINTMENT.

Real estate was devised in 1778 to the son-in-law of the testator for his life, remainder to his daughter (the wife of such son-in-law) for her life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, with cross remainder between them; and, in default of such issue of his daughters, to such person or persons as she should by deed or will appoint. In 1841, the daughter, the donee of the power, executed a deed-poll of appointment, which, reciting the limitations of the estate by the will,—that she had not any issue of her body, and that she was desirous of exercising the power subject to the life-interest of her husband and herself as thereafter mentioned,—appointed that, from and after the decease of the survivor of her husband and herself, “and there being a failure of issue of her,” the said donee of the power, the estate should go, remain, and be unto and to the use of the plaintiff, his heirs and assigns forever:—*Held*, that this was a good appointment of the estate under the power. *Eno v. Eno*, 171

See HUSBAND AND WIFE, 5.

APPORTIONMENT.

See HUSBAND AND WIFE, 2, 3.

APPROPRIATION.

See ADMINISTRATION SUIT, 8.
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ARREARS.

See ANNUITY.

ARREST.

Cases in which the Court, upon ordering the discharge of a party from his arrest, will impose upon him the condition that he shall bring no action in respect of the arrest. *Newton v. Askew*, 324

See PRIVILEGE.

ASSETS.

See ADMINISTRATION SUIT, 1, 2, 4.
EVIDENCE, 1, 2.
EXECUTOR, 2.

ASSIGNEE.

See BANKRUPT.
INSOLVENT DEBTOR.
PARTIES, 9.
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ASSIGNMENT.

1. A Calcutta firm, by a letter dated in January, and received in London on the 11th March, 1841, directed their London correspondents to hold a sum of money, (equal to a lac of rupees, at the current rate of exchange,) payable on the 19th November, following, out of remittances and consignments on the general account, at the disposal of a creditor of the Calcutta firm in Liverpool. The Calcutta house at the same time acquainted the Liverpool house of the directions which had been given. The London house informed the Liverpool house that they had received and registered the order; and after stating that they were in advance of the Calcutta house, and declining to accept bills for

any part of the amount, said, that if remittances should come forward to enable them to meet the wishes of the Calcutta house, they would lose no time in advising the Liverpool house. The London house also, in acknowledging to the Calcutta house the receipt of the order, said, that the state of their accounts did not then warrant them in meeting the requisition, but they would meet it, if in a position to do so, before November. The Calcutta house revoked the order by a letter of January, 1842, received by the London house on the 12th March, 1842, *Held*, that the effect of the triple correspondence between the Calcutta house and the London house, the Calcutta house and the Liverpool house, and the London house and the Liverpool house, entitled the Liverpool house, as against the London house, to an account in equity of the balance on 12th March, 1841, on their general account with the Calcutta house, (giving the London house credit, in such account, for all liabilities incurred by them on behalf of the Calcutta house on that day,) and of the consignments and remittances of the Calcutta house to the London house in the general account, which came to the hands of the latter between the 12th March, 1841, and the 12th March, 1842. *Malcolm v. Scott*, 570

2. The London house might have declined the appropriation, and returned the balance of the account to the Calcutta house, but they could not, as against the Calcutta house, have retained any balance due to the Calcutta house, except for the purpose which the latter had directed. *Id.*

3. *Semble*, that the London house was not merely bound to pay the Liverpool house the amount directed, so far as the balance of account on the 19th November, 1841, enabled them to do so, but was bound to appropriate all the remittances and consignments from the Calcutta house on general account, from the receipt until the revocation of the order, after reimbursing themselves in respect of their advances and liabilities on behalf of the Calcutta house, at the time they received it. *Id.*

4. *Semble*, that the communications between the Calcutta house and the London house, and the Calcutta house and their Liverpool creditor, would not have entitled the latter firm to the account as against the London house, without the

communications which took place between the London and the Liverpool firms. *Id.*

See EVIDENCE, 3.
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See PLEADING, 2.

AUCTIONEER.

See AGENT.
VENDOR AND PURCHASER, 6.

BAILIFF.

See INFANT, 2, 3.

BANKRUPT.

See WITNESS, 14.

BANKRUPTCY.

1. A joint flat in bankruptcy was issued against two partners, pending a suit by one of them against the other and a third person who had previously retired from the business, to set aside the partnership agreement on the ground of fraud and misrepresentation on the part of both defendants, and for repayment of the moneys which the plaintiff had brought into the concern under that agreement. The assignees obtained leave from the Court of Review to prosecute the suit against the retired partner, and they proceeded by supplemental bill, in which the creditors' assignees were plaintiffs and the official assignee and the retired partner were defendants:—*Held*, that the creditors' assignees, who represented not only the original plaintiff on whose behalf relief was sought, but also the bankrupt partner who was an original defendant against whom relief was sought, could not sustain the suit against the retired partner. *Robertson v. Southgate*, 536

2. *Semble*, that, in such a case, the suit might have been prosecuted by assignees appointed to represent the separate estate of the plaintiff in the original suit. *Id.*

3. *Quare*, whether if it had appeared in evidence in the suit, that the defendant the retired partner, was alone, or otherwise, answerable for the fraud, the Court could, in such a case, have made a conditional decree, imposing terms upon the plaintiffs, as representing the bankrupt, who was originally charged as defendant.
Ib.

See TRUSTEE AND CESTUI QUE TRUST, 4.

BIDDER AT SALE.

See VENDOR AND PURCHASER, 4.

BILL.

See PLEADING, 2.
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SUBSTITUTED SERVICE.
SUPPLEMENT.

BILL OF DISCOVERY.

See COSTS, 4.
DISCOVERY.

BILL OF EXCHANGE.

A. accepted a bill of exchange for 150*l.* drawn by and for the accommodation of B. B. indorsed the bill, and then, in order to facilitate its being discounted, procured C. to indorse it. B. subsequently, and before it became due, delivered the bill to a person who advanced him 100*l.* upon it. When the bill became due the holder demanded payment of the 100*l.* from C., and C. some weeks afterwards took up the bill by giving the holder a new bill of exchange for 160*l.*, and the holder then paid him a further sum of 50*l.*, in addition to the 100*l.* he had formerly paid to B. C. brought his action against A. upon the bill, and B. filed his bill to restrain the action, and have the bill delivered up. The common injunction was obtained, but was dissolved on the merits, and C. recovered judgment in the action. At the hearing the bill was dismissed for want of equity, with costs.
Hammon v. Sedgwick, 256

See TRUSTEE AND CESTUI QUE TRUST, 4.

BILL OF SALE.

See EVIDENCE, 3.

BOND.

See EXECUTOR, 2, 3.

BOROUGH.

See STAT. 8 & 9 VIOT. c. 18.

BREACH OF TRUST.

See PARTIES, 7.

BRITISH-BORN SUBJECT.

See ALIEN, 1, 4.

BROKER.

1. Brokers, in the city of London, being directed to purchase iron, delivered to the buyer bought notes, purporting to be notes of the contract for the iron, not disclosing the name of the seller, the brokers guaranteeing the performance of the contract; and the buyer paid the brokers their commission, together with a deposit in part payment of the price of the iron. The buyer afterwards discovered that there was no principal seller of the iron, other than one of the firm of brokers, who intended himself to perform the contract: and upon a bill filed by parties from whom the buyer of the iron had obtained money on the security of the contracts, the deposits were ordered to be repaid, with interest. *Wilson v. Short*, 366

2. If in such a case the plaintiffs had, before the bill was filed, abandoned all interest in the contracts for the iron, they could not afterwards sue for the recovery of the deposits; but the cancellation of certain letters which gave the plaintiffs an interest in the contract as against the brokers, the plaintiffs being at the time of such cancellation ignorant, and the brokers knowing the truth of the case, does not in equity protect the brokers from the claim of the plaintiffs for the recovery of the deposits. *Ib.*

3. If the plaintiffs had known that the brokers were also the sellers of the iron, or if the plaintiffs were otherwise not deceived by their representations, they would not have been entitled to relief in equity. *Wilson v. Short*, 366

4. Knowledge by the buyer of the fact

that there was not any seller of the iron other than the brokers, would not affect parties advancing money to the buyer on the faith of representations made to them by the brokers, that the contract was regular and valid, nor deprive such parties of the right of rescinding the transaction and recovering payments which had been made. *Ib.*

5. There is a remedy in equity as well as at law, by a principal against his broker or agent, to recover a sum of money paid to the broker on his untrue representation that he had entered into a contract for his principal, which alleged contract had in fact no existence. *Ib.*

BUILDING SOCIETY.

The plaintiff became a member of, and purchased twelve and a half shares in a building society, constituted under the statute 6 & 7 Will. 4, c. 32, and the society advanced a sum of 750*l.* in respect of such shares, upon a conveyance of certain property to the trustees of the society by way of mortgage. According to the rules of the society, 10*s.* per month subscription, and 4*s.* per month redemption moneys, were payable on each share, until a sum of 120*l.* per share should be realized for the non-purchasing members. On a bill against the trustees for redemption:—*Held*, that, upon the terms of the mortgage-deed and the rules of the society, the plaintiff was entitled to redeem only upon payment of all the future subscriptions on his shares until the dissolution of the society, the probable duration of the society to be ascertained by calculation, and the future payments to be treated as if immediately due. *Mosley v. Baker*, 87

CERTIFICATE OF SHIP REGISTRY.

See SHIP, 1, 2, 5.

CHAMPERTY.

Though the Court will not enforce a contract for the purchase of a litigated right, yet if a lawful contract for the purchase of an undisputed right be made, and the necessity for litigation as against third persons arise out of circumstances afterwards discovered, the purchaser or assignee is not precluded from suing upon his contract. It is not champerty where the right purchased was originally clear, but the litigation is the result of circum-

stances subsequently arising or subsequently known. *Wilson v. Short*, 366

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See CONSTRUCTION, 14.
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See ALIEN, 1, 4.

COMMISSIONERS FOR REDUCTION OF NATIONAL DEBT.

See PLEADING, 2.

COMMITTAL.

See RECEIVER, 2.

CONSIDERATION.

See BILL OF EXCHANGE.

CONSTRUCTION.

1. Bequest of sums of consols and 4*l.* per Cent. Annuities, to the testator's wife for her life, and at her decease one half of the produce of such sums to be received and divided amongst the testator's surviving brothers and sisters, and their issue, share and share alike:—*Held*, that the brothers and sisters living at the death of the testator took vested interests in the fund, liable to be divested by their death, leaving issue before the period of distribution; and that such issue took, by substitution, for their parents. *Shailer v. Groves*, 162

2. Devise and bequest of residuary, real and personal estate to the testator's son and the heirs of his body forever, and, in case the son should die without children, the whole to be divided amongst the testator's surviving grandchildren, share and share alike:—the son takes an estate tail in the freehold part of the property. *Abram v. Ward*, 165

3. Real estate was devised in 1778, to the son-in-law of the testator for his life, remainder to his daughter (the wife of such son-in-law) for her life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, with cross

remainders between them; and, in default of such issue of his daughters, to such person or persons as he should by deed or will appoint. In 1841, the daughter, the donee of the power, executed a deed-poll of appointment, which, reciting the limitations of the estate by the will,—that she had not any issue of her body, and that she was desirous of exercising the power subject to the life interest of her husband and herself as thereafter mentioned,—appointed that, from and after the decease of the survivor of her husband and herself, “and there being a failure of issue of her” the said donee of the power, the estate should go, remain, and be unto and to the use of the plaintiff, his heirs and assigns forever:—*Held*, that this was a good appointment of the estate under the power. *Eno v. Eno*. 171

4. That the words “and there being a failure of issue of,” &c., must be read either parenthetically, or as applying to the time of the death of the survivor of the donee of the power and her husband. *Ib*.

5. That the construction that the donee might have intended to appoint, or to reserve a power to appoint, to the female descendants of sons, or to give such descendants the chance of taking by descent, would be merely conjectural; and, moreover, was excluded by the express language of the will creating the power, which made no provision for female descendants of male issue,—and rebutted by the great age of the donee, who was then without any issue. *Ib*.

6. That the title of the plaintiff under the appointment, was one which the Court, in a suit for specific performance, would compel the purchaser to take. *Ib*.

7. A gift to children in tail not comprehending all the issue, followed by a limitation over in terms—“on failure of issue,” will generally be read as meaning all such issue as are before mentioned, unless it appears from the context that other issue than these provided for, were intended to take. *Ib*.

8. If the question had arisen entirely under the will of the daughter, and the words “there being a failure of issue of” &c., had been found in that will, following limitations to her issue like those contained in the will of 1778, in this case, those words would have been construed to refer to a failure, not of issue generally,

but of such issue as the will had previously provided for. *Ib*.

9. For the purpose of determining the meaning of such a limitation, the principle of construction must be the same, whether the instrument be a deed or a will. *Eno v. Eno*, 171

10. On construing an appointment of stock in these words, “unto and among my said brother and my sisters and my nephews and nieces living at the decease of my wife in equal shares and proportions,” it was held, that the qualifications of living at the death of the wife attached only to the nephews and nieces, the last antecedent. *Baker v. Baker*, 269

11. The direction as to the shares and proportions in which the legatees are to take the property does not affect the construction of the words which describe the persons who are to take. *Ib*.

12. The legatees took per capita. *Ib*.

13. Household furniture does not pass under the description of “fixtures and fittings up.” *Simmons v. Simmons*, 352

14. Bequest for the benefit of unbene-ficed curates, whose annual incomes do not exceed 35*l*, and to such as shall be recommended in a certain manner—*Held* to comprise two classes,—those having incomes of 36*l*. and under, and also those recommended in the way prescribed. *Pennington v. Buckley*, 453

15. A testator entitled to a copyhold estate in remainder expectant upon the determination of the life estate of his wife in the same premises, by his will gave the income of all his property, wherever situate, or of whatsoever kind, to his wife, for her life; and, at her decease he gave all the property then left by him, and of which she was to have the income for her life, to his children; and on his wife's death, or second marriage, he directed his trustees to receive the rents and dividends arising from the estate and effects he should die possessed of, and to apply the same in the maintenance of his children until the youngest should attain twenty-one:—*Held*, that the interest of the testator in remainder in the copyhold estate passed by his will. *Ford v. Ford*, 486

16. The tendency of modern decisions is to read the different clauses of the

same will referentially to each other, unless they are clearly independent. *Id.*

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See HEIRLOOMS.

REMOTENESS, 1, 2, 4.

TRUSTEE AND CESTUI QUE TRUST, 3, 4, 6.

CONTEMPT.

See RECEIVER, 2.

CONTRACT.

See BROKER.

CHAMPERTY.

PARTNERSHIP.

TITLE, 1.

VENDOR AND PURCHASER, 1 2.

COPYHOLDS.

See INSOLVENT-DEBTOR, 1.

COPY OF BILL.

In a suit by some of the members of a class claiming to be entitled under a conditional limitation by devise in favor of such class, against parties who claimed under a recovery suffered of the estate by the first taker under the same devise, the other members of the class in the same interest as the plaintiffs, who decline to become co-plaintiffs, may be served with the copy of the bill, under the 29th Order of August, 1841; and, if they are required to appear and answer their costs must be paid by the plaintiffs. *Abram v. Ward,*

107

COSTS.

1. A defendant against whom the bill has been dismissed with costs, to be paid by the plaintiff, and received by the plaintiff out of the estate to be administered in the cause, is not bound to serve the parties interested in the estate with a warrant to attend the taxation, but may proceed with the taxation, serving the plaintiff only with the warrant. *Lander v. Ingersoll,*

73

2. A plaintiff suing in forma pauperis, brought his bill to redeem two estates, but was held to be entitled to redeem one estate only, and the mortgagee was

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allowed to add his costs of the suit, in respect of both estates, to the principal and interest due to him on the security of the redeemable estate. *Batchelor v. Middleton,*

86

3. A defendant whose motion to dismiss was answered by a replication, refusing to accept costs for preparing and serving the notice, and proceeding with his motion,—it was refused with costs, minus 20s. *Wright v. Angle,*

109

4. The costs of exceptions to the answer of a defendant to a bill of discovery, which the Master, under the 19th Order of December, 1833, has certified ought to be borne by the defendant, are not within the 28th Order of April, 1828, or the 124th Order of May 1845; but the Court will, upon application (*ex parte*), order such costs to be taxed and deducted from the costs of the suit payable to the defendant. *Hughes v. Clerk,*

195

See ADMINISTRATION SUIT, 4.

COPY OF BILL, 1.

EXECUTOR, 1.

INJUNCTION, 1, 2.

MORTGAGE AND MORTGAGEE, 5, 6.

ORDER, 4.

OUTLAWRY.

PARTIES, 9.

COVENANT.

Where a husband covenanted by his marriage settlement, to give, devise, bequeath, and secure to his widow an annuity for her life after his decease, to be levied, raised, and paid to her by his heirs, executors, or administrators, and the husband afterwards died intestate—It was held, on the authority of *Crouch v. Stratton*, that the widow's share of the husband's personal estate, under the Statute of Distributions, was not to be taken by her as a performance of his covenant, either wholly or pro tanto. *Salisbury v. Salisbury,*

526

See PARTNERSHIP, 1.

CREDITORS.

See PARTIES, 4.

CUMULATIVE LEGACY.

See ANNUITY, 1.

DAMAGES.

See PARTNERSHIP, 1.

DEBTOR AND CREDITOR.

1. Merely voluntary declarations indicating the intention of a creditor to forgive or release a debt, if they are not evidence of a release at law, do not constitute a release in equity. *Cross v. Sprigg*, 552

2. Unless there be a consideration, or some equitable ground of distinction, equity in such a case follows the law. *Id.*

See ASSIGNMENT, 1.

INSOLVENT DEBTOR, 3.

TRUSTEE AND CESTUI QUE TRUST, 4.

DECLARATION.

See DECREE, 2.

DECLARATIONS.

See DEBTOR AND CREDITOR, 1.

DECREE.

1. Decree for specific performance of an agreement for the purchase of part of the estate comprised in a mortgage which had been assigned to the plaintiff; and for redemption of the remainder of the estate by the defendants, according to their priorities, or for successive foreclosures; and in case of redemption by the prior mortgagees in their order, then for redemption by the subsequent mortgagees successively, or for their successive foreclosure. *Sober v. Kemp*, 160

2. Where it is referred to the Master to approve of a settlement in pursuance of an executory trust, the court does not usually insert in the order declarations as to the interests which the parties are thereafter to take, but merely directs the Master to approve of a settlement in conformity with the will, articles, or other direction upon which it is to be founded. *Williams v. Teale*, 254

See BANKRUPTCY, 3.

DEFENDANT.

PLEADING.

DEED.

See CONSTRUCTION, 7.

DEFENDANT.

If a defendant, who has been examined by the plaintiff as a witness in the cause, submits to a decree against himself, notwithstanding such examination, the fact of that examination having been had cannot be sustained by the other defendants who have not been examined, as an objection to the decree against them. *Smith v. Smith*, 524

See PLEADING, 2.

SETTING DOWN CAUSE.

WITNESS, 6, 12.

DELIVERY UP OF INSTRUMENTS,
&c.

See BILL OF EXCHANGE.

SHIP, 1.

DEMURRER.

By the effect of the 37th General Order of August, 1841, the answer put in by a defendant to an original bill, although it extends to matters retained in the amended bill, does not preclude the defendant from demurring generally to such amended bill, by overruling the demurrer, as it would have been held to do before that Order was made. *Wyllie v. Ellice*, 505.

See DISCOVERY.

IMPROVEMENTS, 1.

OUTSTANDING TERM.

WITNESS, 7.

DEPOSIT.

See SPECIFIC PERFORMANCE, 2.

VENDOR AND PURCHASER, 5.

DEVISE.

See CONSTRUCTION, 2.

DILIGENCE.

See TRUSTEE AND CESTUI QUE TRUST, 1, 2.

DISCHARGE.

See ARREST.
MOTION, J.

DISJOIVERY.

Demurrer to a bill of discovery, in aid of action on the case for negligence, allowed; it appearing by the bill that the cause of action had not arisen within six years before the suit. *Smith v. Fox*, 386

DISCRETION.

See TRUSTEE AND CESTUI QUE TRUST, 6, 7.

DISMISSAL OF BILL.

See AMENDMENT.
COSTS, 3.
GENERAL ORDER XXIII OF OCTOBER, 1842.

DISSENTERS.

See STAT. 7 & 8 VICT. c. 45.

DRAWER OF BILL.

See TRUSTEE AND CESTUI QUE TRUST, 4.

ENROLMENT.

See MORTGAGOR AND MORTGAGEE, 3.

EQUITABLE MORTGAGE.

See RECEIVER, 4.

EQUITY RESERVED.

See SETTING DOWN CAUSE, 2.

ERROR IN ORDER OR DECREE.

See GENERAL ORDER XLV. OF APRIL, 1828.

ESTATE TAIL.

See CONSTRUCTION, 2.
REMOTENESS, 1.

EVIDENCE.

1. *Quere*, whether an admission of the payment of legacies by the executor is, in any case, a conclusive admission of assets. *Savage v. Lane*, 32

2. Payment by the executor of the interest of a legacy to the tenant for life under the will is not conclusive as an admission of assets by the executor; but such payment may be explained as having been made by mistake, or for other reasons or causes; and in that case the usual account of assets may be directed at the suit of parties interested in the estate. *Postlethwaite v. Mounsey*, 33, n.

3. Assignment by the sheriff proved by the bill of sale of the under-sheriff, without proof of the authority by the sheriff to the under-sheriff. *Wood v. Rowcliffe*, 186

4. *Quere*, whether a deed vesting lands in trustees for a charitable use, not enrolled under the stat. 9 Geo. 2, c. 36, and therefore within that act "null and void," is admissible in evidence, for the purpose of showing upon what trusts the lands are held, the party having the legal estate admitting that he is a trustee, and claiming no beneficial interest. *Attorney-general v. Ward*, 482

5. An averment in the bill, that a defendant had obtained a grant of letters of administration of the estate, and was the legal personal representative of the author of the trust, is sufficiently proved by the production of such letters of administration, notwithstanding they appear to have been granted on a date subsequent to the institution of the suit. *Bateman v. Margerison*, 496

6. A deed, dated the 2nd of April, 1813, made between a mother and her two illegitimate children, recited, that, by a prior deed of the 28th November, 1804, a trust fund had been appointed by the mother to one of such children, subject to a power of revocation, which was thereby expressed to be exercised, as to one moiety, in favor of the other child. The recited deed of the 28th of November, 1804, was not produced, and no evidence of it (beyond such recital) was given. The deed of the 2nd April, 1813, was in another suit declared not to be a valid appointment, being in favor of persons whom the Court held not to be objects of the power reserved in the recited deed of the 28th of November, 1804; and in a

had paid certain legacies bequeathed by the testator, is not an admission of assets entitling the plaintiff to a decree against the executor for payment of his debt without taking the account, when the bill does not specifically charge the defendant with having made himself personally liable, but prays that an account may be taken, and the estate administered in a due course of administration. *Savage v. Lane*, 32

2. Where a testator, in his lifetime, conveyed to trustees the mines and minerals under certain lands upon trusts for himself (the testator) for life, and after his death upon trust for sale, and out of the proceeds—first, to pay all his debts, so as to discharge his real and personal estate therefrom; secondly, to apply 3000*l.* to the purposes of his will; and, lastly, to divide the surplus among certain persons therein named—the persons to whom the surplus is thus given are proper parties to a creditor's suit seeking to follow the real as well as the personal estate of the testator; but the Court may, in its discretion, make a decree for administration in their absence. *Id.*

3. The circumstance, that a fund, in which a party takes a life interest under a will, is transferred by the executor to the trustees of that fund appointed by the will, is not necessarily and conclusively a severance of the fund from the bulk of the estate, unless the executor has, by such transfer, done all that it is incumbent upon him to do in the administration of the fund. *Pennington v. Buckley*, 451

4. Upon a transfer to trustees of a fund bequeathed to them upon trust to pay the interest to a tenant for life, without any bequest of the corpus, or with a bequest thereof of doubtful validity, and which upon construction might fail, so that the corpus would ultimately become part of the residuary estate, the trustees of such fund are not, *ipso facto*, trustees for the residuary legatees or the next of kin, but the corpus of the fund must be regarded as assets of the testator's estate unadministered ultra the life estate. *Id.*

5. The circumstance, that the residue of the estate (omitting the fund so vested in trustees for the tenant for life) has been administered in equity, does not affect the principle; nor is it less applicable, because, from the time which has elapsed since the death of the testator, the executor is not a necessary party in

the administration of the particular fund, and has not been made a party to the suit. *Id.*

See RECEIVER, 3,

ADMINISTRATOR.

See EXECUTOR.

ADMISSION.

See EVIDENCE, 1, 2.

ADMISSIONS.

See INJUNCTION, 3.

AFFIDAVIT OF SERVICE.

The application of a party by his counsel, for time to answer affidavits filed in support of a motion, whereupon time was given and affidavits filed, is not an appearance by that party on the motion entitling the other party to obtain the order on a subsequent motion day, without an affidavit of service—no counsel then appearing for the opposing party. *Hutton v. Hepworth*, 319

See ORDER, 1, 2.

AGENT.

1. The Factors Act (5 & 6 Vict. c. 39) applies to mercantile transactions, and not to the case of advances made upon the security of furniture used in a furnished house,—not in the way of trade,—to the apparent owner of such furniture, such apparent owner afterwards appearing to be the agent intrusted with the custody of the furniture by the true owner. *Wood v. Roucliffe*, 191

2. Such "agent" is not an agent, nor is such furniture "goods and merchandise" within the meaning of the statute 5 & 6 Vict. c. 39. *Id.*

See BROKER.
INTEREST.

AGREEMENT.

See CONTRACT.
HUSBAND AND WIFE, 4.
STAMP, 3.

ALIEN.

1. A., who was by birth an Englishman, emigrated to the United States of America after the recognition of their independence by the Treaty of 1783, and took the oaths of obedience to the American Government, and of abjuration of all other allegiance,—married an American woman, and had a son of that marriage (B.) born in the United States. B. had a son (C.,) who was also born in America, out of the Queen's dominions: *Held*, that C. was capable of inheriting real estate as a British subject within the statutes 13 Geo. 3, c. 21, and 4 Geo. 2, c. 21. *Fitch v. Weber*, 51

2. The abjuration by a British subject of his allegiance to the Crown, and his promise of obedience to a foreign state, although it might have rendered him liable, under the statute 3 James 1, c. 4, ss. 22, 23, to the penalty of high treason, does not therefore disqualify the children of such British subject from inheriting, in the absence of any attainder of such British subject by judgment, outlawry or otherwise. *Ib.*

3. The exclusion from the benefits of the statute 4 Geo. 2, c. 21, s. 2, of the children of fathers who at the time of their birth, were liable to the penalties of high treason or felony in case of the returning into this kingdom or Ireland without the royal license, is not to be construed as requiring the Court to determine incidentally, and in the absence of the party charged, that he has been guilty of treason or felony; but the exclusion must be construed as restricted to that class of offences in which the penalty is annexed to the fact of returning without license. *Ib.*

4. The privileges which the statutes 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, confer are the privileges of the children, and not of the father; and, therefore, acts intended by a British born subject to have the effect of acts of abandonment or abjuration of his rights in that character do not deprive his children of the benefit of the statutes of the 4 Geo. 2, c. 21, and 13 Geo. 3, c. 21, unless such acts bring them within the disqualifying provisions of those statutes. *Ib.*

5. A person claiming the benefit of the statute 13 Geo. 3, c. 21, does not lose that benefit only because he does not conform or qualify in the manner prescribed by sect. 3 of that statute, within

five years from the accruer of his right or interest. *Ib.*

ALIQUOT SHARE.

See **PARTIES**, 3.

ALLEGIANCE.

See **ALIEN**, 1, 2.

AMENDMENT.

1. Where a cause is, at the hearing, ordered to stand over, with liberty to the plaintiff to amend by adding parties, and no further proceedings are taken, the proper course for the defendant is to move, upon notice, that the bill be amended within a certain time, or that it be dismissed; and not to move that it be dismissed simply. *Emerson v. Emerson*, 442

2. Under an order made at the hearing of the cause, giving the plaintiff leave to amend his bill, by adding proper parties, with apt words to charge them, or by stating reasons to show why particular persons should not be parties, or to file a supplemental bill, the plaintiff may amend by stating a grant of letters of administration to the estate of a deceased person to one who is already a defendant in the suit, and by expunging a statement which the bill originally contained, that the deceased person had died insolvent, and had no personal representative. *Bateman v. Margerison*, 502

See **ORDER**, 4.

AMERICAN TREATY.

See **ALIEN**, 1.

ANNUITY.

1. A bequest by the will of the testatrix of an annuity to her "servant," E. H., and a bequest by a codicil three years afterwards, of an annuity of the same amount to her "servant," E. H.—*Held* to be cumulative, the word servant not expressing the motive, but being descriptive only. *Roch v. Callen*, 531

2. Notwithstanding the principal question in the suit be the right of the plain-

tiff to two annuities, one of which only has been paid, the defendant, on a decree being made for the arrears of the unpaid annuity, cannot set up the Statute of Limitations as limiting the period of the account, if the benefit of the statute be not claimed upon the pleadings. *Id.*

3. An annuity given by a will, forming no charge upon land, but being personal only, is not within the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 42. *Id.*

See COVENANT.

VENDOR AND PURCHASER, 3.

ANSWER.

See DEMURRER.
PLEA, 1.

APPEARANCE.

See PLEA, 2.
RECEIVER, 4.
SERVICE.

APPOINTMENT.

Real estate was devised in 1778 to the son-in-law of the testator for his life, remainder to his daughter (the wife of such son-in-law) for her life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, with cross remainder between them; and, in default of such issue of his daughters, to such person or persons as she should by deed or will appoint. In 1841, the daughter, the donee of the power, executed a deed-poll of appointment, which, reciting the limitations of the estate by the will,—that she had not any issue of her body, and that she was desirous of exercising the power subject to the life-interest of her husband and herself as thereafter mentioned,—appointed that, from and after the decease of the survivor of her husband and herself, “and there being a failure of issue of her,” the said donee of the power, the estate should go, remain, and be unto and to the use of the plaintiff, his heirs and assigns forever:—*Held*, that this was a good appointment of the estate under the power. *Eno v. Eno*, 171

See HUSBAND AND WIFE, 5.

APPORTIONMENT.

See HUSBAND AND WIFE, 2, 3.

APPROPRIATION.

See ADMINISTRATION SUIT, 8.
ASSIGNMENT, 2, 3.
EXECUTOR, 2.

ARREARS.

See ANNUITY.

ARREST.

Cases in which the Court, upon ordering the discharge of a party from his arrest, will impose upon him the condition that he shall bring no action in respect of the arrest. *Newton v. Askew*, 324

See PRIVILEGE.

ASSETS.

See ADMINISTRATION SUIT, 1, 2, 4.
EVIDENCE, 1, 2.
EXECUTOR, 2.

ASSIGNEE.

See BANKRUPT.
INSOLVENT DEBTOR.
PARTIES, 9.
WITNESS, 14.

ASSIGNMENT.

1. A Calcutta firm, by a letter dated in January, and received in London on the 11th March, 1841, directed their London correspondents to hold a sum of money, (equal to a lac of rupees, at the current rate of exchange,) payable on the 19th November, following, out of remittances and consignments on the general account, at the disposal of a creditor of the Calcutta firm in Liverpool. The Calcutta house at the same time acquainted the Liverpool house of the directions which had been given. The London house informed the Liverpool house that they had received and registered the order; and after stating that they were in advance of the Calcutta house, and declining to accept bills for

any part of the amount, said, that if remittances should come forward to enable them to meet the wishes of the Calcutta house, they would lose no time in advising the Liverpool house. The London house also, in acknowledging to the Calcutta house the receipt of the order, said, that the state of their accounts did not then warrant them in meeting the requisition, but they would meet it, if in a position to do so, before November. The Calcutta house revoked the order by a letter of January, 1842, received by the London house on the 12th March, 1842, *Held*, that the effect of the triple correspondence between the Calcutta house and the London house, the Calcutta house and the Liverpool house, and the London house and the Liverpool house, entitled the Liverpool house, as against the London house, to an account in equity of the balance on 12th March, 1841, on their general account with the Calcutta house, (giving the London house credit, in such account, for all liabilities incurred by them on behalf of the Calcutta house on that day,) and of the consignments and remittances of the Calcutta house to the London house in the general account, which came to the hands of the latter between the 12th March, 1841, and the 12th March, 1842. *Malcolm v. Scott*, 570.

2. The London house might have declined the appropriation, and returned the balance of the account to the Calcutta house, but they could not, as against the Calcutta house, have retained any balance due to the Calcutta house, except for the purpose which the latter had directed. *Id.*

3. *Semble*, that the London house was not merely bound to pay the Liverpool house the amount directed, so far as the balance of account on the 19th November, 1841, enabled them to do so, but was bound to appropriate all the remittances and consignments from the Calcutta house on general account, from the receipt until the revocation of the order, after reimbursing themselves in respect of their advances and liabilities on behalf of the Calcutta house, at the time they received it. *Id.*

4. *Semble*, that the communications between the Calcutta house and the London house, and the Calcutta house and their Liverpool creditor, would not have entitled the latter firm to the account as against the London house, without the

communications which took place between the London and the Liverpool firms. *Id.*

See EVIDENCE, 3.
INSOLVENT DEBTOR, 1, 2.

ATTORNEY.

See SOLICITOR.

ATTORNEY-GENERAL.

See PLEADING, 2.

AUCTIONEER.

See AGENT.
VENDOR AND PURCHASER, 6.

BAILIFF.

See INFANT, 2, 3.

BANKRUPT.

See WITNESS, 14.

BANKRUPTCY.

1. A joint flat in bankruptcy was issued against two partners, pending a suit by one of them against the other and a third person who had previously retired from the business, to set aside the partnership agreement on the ground of fraud and misrepresentation on the part of both defendants, and for re-payment of the moneys which the plaintiff had brought into the concern under that agreement. The assignees obtained leave from the Court of Review to prosecute the suit against the retired partner, and they proceeded by supplemental bill, in which the creditors' assignees were plaintiffs and the official assignee and the retired partner were defendants:—*Held*, that the creditors' assignees, who represented not only the original plaintiff on whose behalf relief was sought, but also the bankrupt partner who was an original defendant against whom relief was sought, could not sustain the suit against the retired partner. *Robertson v. Southgate*, 536.

2. *Semble*, that, in such a case, the suit might have been prosecuted by assignees appointed to represent the separate estate of the plaintiff in the original suit. *Id.*

3. *Quare*, whether if it had appeared in evidence in the suit, that the defendant the retired partner, was alone, or otherwise, answerable for the fraud, the Court could, in such a case, have made a conditional decree, imposing terms upon the plaintiff, as representing the bankrupt, who was originally charged as defendant. *Ib.*

See TRUSTEE AND CESTUI QUE TRUST, 4.

BIDDER AT SALE.

See VENDOR AND PURCHASER, 4.

BILL.

See PLEADING, 2.
REVIVOR.
SUBSTITUTED SERVICE.
SUPPLEMENT.

BILL OF DISCOVERY.

See COSTS, 4.
DISCOVERY.

BILL OF EXCHANGE.

A. accepted a bill of exchange for 150*l.* drawn by and for the accommodation of B. B. indorsed the bill, and then, in order to facilitate its being discounted, procured C. to indorse it. B. subsequently, and before it became due, delivered the bill to a person who advanced him 100*l.* upon it. When the bill became due the holder demanded payment of the 100*l.* from C., and C. some weeks afterwards took up the bill by giving the holder a new bill of exchange for 160*l.*, and the holder then paid him a further sum of 50*l.*, in addition to the 100*l.* he had formerly paid to B. C. brought his action against A. upon the bill, and B. filed his bill to restrain the action, and have the bill delivered up. The common injunction was obtained, but was dissolved on the merits, and C. recovered judgment in the action. At the hearing the bill was dismissed for want of equity, with costs. *Hammon v. Sedgwick*, 256

See TRUSTEE AND CESTUI QUE TRUST, 4.

BILL OF SALE.

See EVIDENCE, 3.

BOND.

See EXECUTOR, 2, 3.

BOROUGH.

See STAT. 8 & 9 VICT. c. 18.

BREACH OF TRUST.

See PARTIES, 7.

BRITISH-BORN SUBJECT.

See ALIEN, 1, 4.

BROKER.

1. Brokers, in the city of London, being directed to purchase iron, delivered to the buyer bought notes, purporting to be notes of the contract for the iron, not disclosing the name of the seller, the brokers guaranteeing the performance of the contract; and the buyer paid the brokers their commission, together with a deposit in part payment of the price of the iron. The buyer afterwards discovered that there was no principal seller of the iron, other than one of the firm of brokers, who intended himself to perform the contract: and upon a bill filed by parties from whom the buyer of the iron had obtained money on the security of the contracts, the deposits were ordered to be repaid, with interest. *Wilson v. Short*, 366

2. If in such a case the plaintiffs had, before the bill was filed, abandoned all interest in the contracts for the iron, they could not afterwards sue for the recovery of the deposits; but the cancellation of certain letters which gave the plaintiffs an interest in the contract as against the brokers, the plaintiffs being at the time of such cancellation ignorant, and the brokers knowing the truth of the case, does not in equity protect the brokers from the claim of the plaintiffs for the recovery of the deposits. *Ib.*

3. If the plaintiffs had known that the brokers were also the sellers of the iron, or if the plaintiffs were otherwise not deceived by their representations, they would not have been entitled to relief in equity. *Wilson v. Short*, 366

4. Knowledge by the buyer of the fact

that there was not any seller of the iron, other than the brokers, would not affect parties advancing money to the buyer on the faith of representations made to them by the brokers, that the contract was regular and valid, nor deprive such parties of the right of rescinding the transaction and recovering payments which had been made. *Id.*

5. There is a remedy in equity as well as at law, by a principal against his broker or agent, to recover a sum of money paid to the broker on his untrue representation that he had entered into a contract for his principal, which alleged contract had in fact no existence. *Id.*

BUILDING SOCIETY.

The plaintiff became a member of, and purchased twelve and a half shares in a building society, constituted under the statute 6 & 7 Will. 4, c. 32, and the society advanced a sum of 750*l.* in respect of such shares, upon a conveyance of certain property to the trustees of the society by way of mortgage. According to the rules of the society, 10*s.* per month subscription, and 4*s.* per month redemption moneys, were payable on each share, until a sum of 120*l.* per share should be realized for the non-purchasing members. On a bill against the trustees for redemption:—*Held*, that, upon the terms of the mortgage-deed and the rules of the society, the plaintiff was entitled to redeem only upon payment of all the future subscriptions on his shares until the dissolution of the society, the probable duration of the society to be ascertained by calculation, and the future payments to be treated as if immediately due. *Mosley v. Baker*, 87

CERTIFICATE OF SHIP REGISTRY.

See SHIP, 1, 2, 5.

CHAMPERTY.

Though the Court will not enforce a contract for the purchase of a litigated right, yet if a lawful contract for the purchase of an undisputed right be made, and the necessity for litigation as against third persons arise out of circumstances afterwards discovered, the purchaser or assignee is not precluded from suing upon his contract. It is not champerty where the right purchased was originally clear, but the litigation is the result of circum-

stances subsequently arising or subsequently known. *Wilson v. Short*, 366

CHARITY.

See CONSTRUCTION, 14.
MORTMAIN ACT.

CHILDREN.

See ALIEN, 1, 4.

COMMISSIONERS FOR REDUCTION OF NATIONAL DEBT.

See PLEADING, 2.

COMMITTAL.

See RECEIVER, 2.

CONSIDERATION.

See BILL OF EXCHANGE.

CONSTRUCTION.

1. Bequest of sums of consols and 4*l.* per Cent. Annuities, to the testator's wife for her life, and at her decease one half of the produce of such sums to be received and divided amongst the testator's surviving brothers and sisters, and their issue, share and share alike:—*Held*, that the brothers and sisters living at the death of the testator took vested interests in the fund, liable to be divested by their death, leaving issue before the period of distribution; and that such issue took, by substitution, for their parents. *Shailer v. Groves*, 162

2. Devise and bequest of residuary, real and personal estate to the testator's son and the heirs of his body forever, and, in case the son should die without children, the whole to be divided amongst the testator's surviving grandchildren, share and share alike:—the son takes an estate tail in the freehold part of the property. *Abram v. Ward*, 165

3. Real estate was devised in 1778, to the son-in-law of the testator for his life, remainder to his daughter (the wife of such son-in-law) for her life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail, with cross

remainders between them; and, in default of such issue of his daughters, to such person or persons as he should by deed or will appoint. In 1841, the daughter, the donee of the power, executed a deed-poll of appointment, which, reciting the limitations of the estate by the will,—that she had not any issue of her body, and that she was desirous of exercising the power subject to the life interest of her husband and herself as thereafter mentioned,—appointed that, from and after the decease of the survivor of her husband and herself, “and there being a failure of issue of her” the said donee of the power, the estate should go, remain, and be unto and to the use of the plaintiff, his heirs and assigns forever:—*Held*, that this was a good appointment of the estate under the power. *Eno v. Eno*, 171

4. That the words “and there being a failure of issue of,” &c., must be read either parenthetically, or as applying to the time of the death of the survivor of the donee of the power and her husband. *Ib.*

5. That the construction that the donee might have intended to appoint, or to reserve a power to appoint, to the female descendants of sons, or to give such descendants the chance of taking by descent, would be merely conjectural; and, moreover, was excluded by the express language of the will creating the power, which made no provision for female descendants of male issue,—and rebutted by the great age of the donee, who was then without any issue. *Ib.*

6. That the title of the plaintiff under the appointment, was one which the Court, in a suit for specific performance, would compel the purchaser to take. *Ib.*

7. A gift to children in tail not comprehending all the issue, followed by a limitation over in terms—“on failure of issue,” will generally be read as meaning all such issue as are before mentioned, unless it appears from the context that other issue than these provided for, were intended to take. *Ib.*

8. If the question had arisen entirely under the will of the daughter, and the words “there being a failure of issue of” &c., had been found in that will, following limitations to her issue like those contained in the will of 1778, in this case, those words would have been construed to refer to a failure, not of issue generally,

but of such issue as the will had previously provided for. *Ib.*

9. For the purpose of determining the meaning of such a limitation, the principle of construction must be the same, whether the instrument be a deed or a will. *Eno v. Eno*, 171

10. On construing an appointment of stock in these words, “unto and among my said brother and my sisters and my nephews and nieces living at the decease of my wife in equal shares and proportions,” it was held, that the qualifications of living at the death of the wife attached only to the nephews and nieces, the last antecedent. *Baker v. Baker*, 269

11. The direction as to the shares and proportions in which the legatees are to take the property does not affect the construction of the words which describe the persons who are to take. *Ib.*

12. The legatees took per capita. *Ib.*

13. Household furniture does not pass under the description of “fixtures and fittings up.” *Simmons v. Simmons*, 352

14. Bequest for the benefit of unbene-ficed curates, whose annual incomes do not exceed 35*l*., and to such as shall be recommended in a certain manner—*Held* to comprise two classes,—those having incomes of 36*l*. and under, and also those recommended in the way prescribed. *Pennington v. Buckley*, 453

15. A testator entitled to a copyhold estate in remainder expectant upon the determination of the life estate of his wife in the same premises, by his will gave the income of all his property, wherever situate, or of whatsoever kind, to his wife, for her life; and, at her decease he gave all the property then left by him, and of which she was to have the income for her life, to his children; and on his wife's death, or second marriage, he directed his trustees to receive the rents and dividends arising from the estate and effects he should die possessed of, and to apply the same in the maintenance of his children until the youngest should attain twenty-one:—*Held*, that the interest of the testator in remainder in the copyhold estate passed by his will. *Ford v. Ford*, 486

16. The tendency of modern decisions is to read the different clauses of the

same will referentially to each other, unless they are clearly independent. *Id.* 492

See HEIRLOOMS.

REMOVEDNESS, 1, 2, 4.

TRUSTEE AND CESTUI QUE TRUST, 3, 4, 6.

CONTEMPT.

See RECEIVER, 2.

CONTRACT.

See BROKER.

CHAMPERTY.

PARTNERSHIP.

TITLE, 1.

VENDOR AND PURCHASER, 1 2.

COPYHOLDS.

See INSOLVENT-DEBTOR, 1.

COPY OF BILL.

In a suit by some of the members of a class claiming to be entitled under a conditional limitation by devise in favor of such class, against parties who claimed under a recovery suffered of the estate by the first taker under the same devise, the other members of the class in the same interest as the plaintiffs, who decline to become co-plaintiffs, may be served with the copy of the bill, under the 29th Order of August, 1841; and, if they are required to appear and answer their costs must be paid by the plaintiffs. *Abram v. Ward*, 107

COSTS.

1. A defendant against whom the bill has been dismissed with costs, to be paid by the plaintiff, and received by the plaintiff out of the estate to be administered in the cause, is not bound to serve the parties interested in the estate with a warrant to attend the taxation, but may proceed with the taxation, serving the plaintiff only with the warrant. *Lander v. Ingersoll*, 73

2. A plaintiff suing in forma pauperis, brought his bill to redeem two estates, but was held to be entitled to redeem one estate only, and the mortgagee was

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allowed to add his costs of the suit, in respect of both estates, to the principal and interest due to him on the security of the redeemable estate. *Batchelor v. Middleton*, 86

3. A defendant whose motion to dismiss was answered by a replication, refusing to accept costs for preparing and serving the notice, and proceeding with his motion,—it was refused with costs, minus 20s. *Wright v. Angle*, 109

4. The costs of exceptions to the answer of a defendant to a bill of discovery, which the Master, under the 19th Order of December, 1833, has certified ought to be borne by the defendant, are not within the 28th Order of April, 1828, or the 124th Order of May 1845; but the Court will, upon application (*ex parte*) order such costs to be taxed and deducted from the costs of the suit payable to the defendant. *Hughes v. Clerk*, 195

See ADMINISTRATION SUIT, 4.

COPY OF BILL, 1.

EXECUTOR, 1.

INJUNCTION, 1, 2.

MORTGAGOR AND MORTGAGEE, 5, 6.

ORDER, 4.

OUTLAWRY.

PARTIES, 9.

COVENANT.

Where a husband covenanted by his marriage settlement, to give, devise, bequeath, and secure to his widow an annuity for her life after his decease, to be levied, raised, and paid to her by his heirs, executors, or administrators, and the husband afterwards died intestate—It was held, on the authority of *Crouch v. Stratton*, that the widow's share of the husband's personal estate, under the Statute of Distributions, was not to be taken by her as a performance of his covenant, either wholly or pro tanto. *Salisbury v. Salisbury*, 526

See PARTNERSHIP, 1.

CREDITORS.

See PARTIES, 4.

CUMULATIVE LEGACY.

See ANNUITY, 1.

DAMAGES.

See PARTNERSHIP, 1.

DEBTOR AND CREDITOR.

1. Merely voluntary declarations indicating the intention of a creditor to forgive or release a debt, if they are not evidence of a release at law, do not constitute a release in equity. *Cross v. Sprigg*, 552

2. Unless there be a consideration, or some equitable ground of distinction, equity in such a case follows the law. *Ib.*

See ASSIGNMENT, 1.

INSOLVENT DEBTOR, 3.

TRUSTEE AND CESTUI QUE TRUST, 4.

DECLARATION.

See DECREE, 2.

DECLARATIONS.

See DEBTOR AND CREDITOR, 1.

DECREE.

1. Decree for specific performance of an agreement for the purchase of part of the estate comprised in a mortgage which had been assigned to the plaintiff; and for redemption of the remainder of the estate by the defendants, according to their priorities, or for successive foreclosures; and in case of redemption by the prior mortgagees in their order, then for redemption by the subsequent mortgagees successively, or for their successive foreclosure. *Sober v. Kemp*, 160

2. Where it is referred to the Master to approve of a settlement in pursuance of an executory trust, the court does not usually insert in the order declarations as to the interests which the parties are thereafter to take, but merely directs the Master to approve of a settlement in conformity with the will, articles, or other direction upon which it is to be founded. *Williams v. Teale*, 254

See BANKRUPTCY, 3.

DEPENDANT.
PLEADING.

DEED.

See CONSTRUCTION, 7.

DEFENDANT.

If a defendant, who has been examined by the plaintiff as a witness in the cause, submits to a decree against himself, notwithstanding such examination, the fact of that examination having been had cannot be sustained by the other defendants who have not been examined, as an objection to the decree against them. *Smith v. Smith*, 524

See PLEADING, 2.

SETTING DOWN CAUSE.
WITNESS, 6, 12.DELIVERY UP OF INSTRUMENTS,
&c.See BILL OF EXCHANGE.
SHIP, 1.

DEMURRER.

By the effect of the 37th General Order of August, 1841, the answer put in by a defendant to an original bill, although it extends to matters retained in the amended bill, does not preclude the defendant from demurring generally to such amended bill, by overruling the demurrer, as it would have been held to do before that Order was made. *Wyllie v. Ellice*, 505

See DISCOVERY.

IMPROVEMENTS, 1.
OUTSTANDING TERM.
WITNESS, 7.

DEPOSIT.

See SPECIFIC PERFORMANCE, 2.
VENDOR AND PURCHASER, 5.

DEVISE.

See CONSTRUCTION, 2.

DILIGENCE.

See TRUSTEE AND CESTUI QUE TRUST, 1, 2.

DISCHARGE.

See ARREST.
MOTION, 1.

DISCOVERY.

Demurrer to a bill of discovery, in aid of action on the case for negligence, allowed; it appearing by the bill that the cause of action had not arisen within six years before the suit. *Smith v. Fox*, 386

DISCRETION.

See TRUSTEE AND CESTUI QUE TRUST, 6, 7.

DISMISSAL OF BILL.

See AMENDMENT.
COSTS, 3.
GENERAL ORDER XXIII OF OCTOBER, 1842.

DISSENTERS.

See STAT. 7 & 8 VICT. C. 45.

DRAWER OF BILL.

See TRUSTEE AND CESTUI QUE TRUST, 4.

ENROLMENT.

See MORTGAGOR AND MORTGAGEE, 3.

EQUITABLE MORTGAGE.

See RECEIVER, 4.

EQUITY RESERVED.

See SETTING DOWN CAUSE, 2.

ERROR IN ORDER OR DECREE.

See GENERAL ORDER XLV. OF APRIL, 1828.

ESTATE TAIL.

See CONSTRUCTION, 2.
REMOVEDNESS, 1.

EVIDENCE.

1. *Quære*, whether an admission of the payment of legacies by the executor is, in any case, a conclusive admission of assets. *Savage v. Lane*, 32

2. Payment by the executor of the interest of a legacy to the tenant for life under the will is not conclusive as an admission of assets by the executor; but such payment may be explained as having been made by mistake, or for other reasons or causes; and in that case the usual account of assets may be directed at the suit of parties interested in the estate. *Postlethwaite v. Mounsey*, 33, n.

3. Assignment by the sheriff proved by the bill of sale of the under-sheriff, without proof of the authority by the sheriff to the under-sheriff. *Wood v. Rowcliffe*, 186

4. *Quære*, whether a deed vesting lands in trustees for a charitable use, not enrolled under the stat. 9 Geo. 2, c. 36, and therefore within that act "null and void," is admissible in evidence, for the purpose of showing upon what trusts the lands are held, the party having the legal estate admitting that he is a trustee, and claiming no beneficial interest. *Attorney-general v. Ward*, 432

5. An averment in the bill, that a defendant had obtained a grant of letters of administration of the estate, and was the legal personal representative of the author of the trust, is sufficiently proved by the production of such letters of administration, notwithstanding they appear to have been granted on a date subsequent to the institution of the suit. *Bateman v. Margerison*, 496

6. A deed, dated the 2nd of April, 1813, made between a mother and her two illegitimate children, recited, that, by a prior deed of the 28th November, 1804, a trust fund had been appointed by the mother to one of such children, subject to a power of revocation, which was thereby expressed to be exercised, as to one moiety, in favor of the other child. The recited deed of the 28th of November, 1804, was not produced, and no evidence of it (beyond such recital) was given. The deed of the 2nd April, 1813, was in another suit declared not to be a valid appointment, being in favor of persons whom the Court held not to be objects of the power reserved in the recited deed of the 28th of November, 1804; and in a

suit by other persons claiming under legitimate children, and appointees of the same mother by an instrument later in date than that of April, 1813, the Court decreed the transfer of the fund to the parties representing such legitimate children, and refused to direct any inquiry as to the recited appointment of the 28th of November, 1804. *Bell v. Alexander*, 543

7. *Qacere*, as to the effect which would have been given to the recital of the deed of the 28th November, 1804, if the title of the plaintiff in the last suit had been founded upon, or had been derived under or through, the deed of the 2nd of April, 1813, which recited that of the 28th of November, 1804. *Id.*

See DEBTOR AND CREDITOR, 1.
INJUNCTION, 3.
INQUIRY.
STAT. 7 & 8 VICT. C. 45.
WITNESS.

EXAMINATION.

See DEFENDANT.
WITNESS.

EXCEPTIONS.

See COSTS, 4.

EXECUTOR.

1. An executor, in a suit for the arrears of an annuity under a will, disputing the title of the plaintiff to the annuity as a question of law, but admitting assets sufficient to pay funeral and testamentary expenses and legacies, may be decreed to pay the costs of the suit in addition to the arrears, and is not entitled to a decree for an account of the assets prior to any decree being made for costs. *Roch v. Callen*, 501

2. An executor having assets of his testator, either in money or goods, before any bill had been filed for the administration of the estate, applied to a creditor of the testator for a loan of a sum of money equal in amount to the debt; and the creditor accepted the personal security of the executor for the amount, and released his debt against the estate:—*Held*, that the executor having, by such substitution of his own security for that of the estate, discharged the debt, as

against the estate, should not be treated as a mere purchaser of the debt of the creditor, and, as such, entitled only to stand in the place of the creditor; but that the executor was entitled to be allowed, in his own discharge, the amount of the debt as a debt of the testator preferred and paid. *Hepworth v. Heslop*, 561

3. On a question in the administration of assets, whether a bond given by a testator to his son for alleged arrears of salary was voluntary or for valuable consideration, the Court, not relying on the admission of the testator, or the examination of the son and executor, in a case where the estate was insolvent, directed an issue on the question, whether the testator, at the time of executing the bond, was indebted to the obligee to the amount thereby secured. *Id.*

See ADMINISTRATION SUIT, 1, 2, 4, 5.
EVIDENCE, 1, 2.
PARTNERSHIP, 1, 2.

FACTOR.

See AGENT, 1.

FAILURE OF ISSUE.

See CONSTRUCTION, 4, 5, 7, 8.

FORECLOSURE.

See DEGREE.
MORTGAGOR AND MORTGAGEE, 3.

FREIGHT.

See SHIP, 3, 4, 6, 7.

FURNITURE.

See CONSTRUCTION, 13.

FUTURE COVERTURE.

See HUSBAND AND WIFE, 4.

GENERAL ORDERS.

Lord Clarendon's Orders, July, 1666.

See OUTLAWRY.

XXVIII. of April, 1828.

See COSTS, 4.

XLV. *Id.*

The accidental omission of an usual term or direction in a decree or order is an error which may be corrected by petition under the 54th Order of April, 1828; but not so the omission of any term or direction which would only have been introduced under the express judgment of the Court. *Bird v. Heath*, 236

XIX. of December, 1833.

See COSTS, 4.

XXIX. of August, 1841.

See COPY OF BILL, 1.

XXXVII. *Id.*

See DEMURRER.

XVIII. of October, 1842.

See SOLICITOR, 2.

XXIII. *Id.*

The omission by a party to serve notice, according to the 23rd General Order of October, 1842, of filing a replication, plea, demurrer, &c., and the opposite party on the same day that the replication, plea, demurrer, &c., is filed, will, in ordinary cases, be corrected, not by rendering the replication, plea, demurrer, &c., inoperative, or taking it off the file for irregularity, but by extending the time allowed to the opposite party for taking the next step in the cause, so as to give him the benefit of the time which he would otherwise lose by the delay in the service. *Wright v. Angle*, 107

LVI. of May, 1845.

See TRAVERSING NOTE.

CXXIV. *Id.*

See COSTS, 4.

GOODS AND MERCHANDISE.

See AGENT, 2.

GUARDIAN.

See INFANT, 2, 3.

GUARDIAN AD LITEM.

See INFANT, 1.

HABEAS CORPUS.

See MOTION, 1.

HEARING.

See AMENDMENT, 1, 2.
INJUNCTION, 1, 4.
INQUIRY.
WITNESS, 12.

HEIR-AT-LAW.

The testatrix devised and bequeathed her real and personal estate in trust, as to the real estate, for sale, as soon after her decease as conveniently could be, and declared that the trustees should stand possessed of the proceeds of the sale as a fund of personal and not real estate, for which purpose such proceeds or any part thereof, should not, in any event, lapse or result for the benefit of her heir-at-law; and, after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects as she should, by any codicil to that her will, direct or appoint. The testatrix made no codicil:—*Held*, that the heir-at-law was entitled to the proceeds of the real estate undisposed of by the will. *Fitch v. Weber*, 145

See ALIEN.

HEIRLOOMS.

1. Bequest of plate, jewels, and other chattels by the Earl of Abergavenny to his son, Viscount Nevill, and his heirs, Earls of Abergavenny, "to be held as heirlooms," with a direction to the testator's executors to make an inventory of all such chattels and effects; and a subsequent bequest by a codicil, declaring, that, in addition to the articles and things

he had in his will made heirlooms, certain other articles should be considered and taken to be heirlooms, and bequeathing the same to his executors "as heirlooms in" his "family," directing them to make an inventory thereof, and sign the same:—*Held*, that the gift of the chattels was not executory; that the same vested absolutely in the first taker, Viscount Nevill, who succeeded the testator in the earldom; and that, not having been disposed of by him in his lifetime, the same upon his death passed to his executors. *Rowland v. Morgan*, 463

2. The addition in the codicil of the words "as heirlooms in my family," gives rise to no distinction in point of construction. *Ib.*

3. *Semble*, if the gift had been executory, inasmuch as there was the dignity, the family estate, and the purchased estate, and it was not certain, upon the language of the bequest, to which the testator would annex the chattels, the conclusion would have been the same. *Ib.*

HUSBAND AND WIFE.

Bequest of leaseholds to a married woman "for her whole and sole use during her life, free from the control of any future husband, and not to be sold or mortgaged, and, after her decease, to her heir or heirs, and provided her child or children should die before her, then that she may, at her decease, leave them to whom she will for the remainder of the term." The husband and wife demised the premises to a purchaser, and the purchaser demised them to another. The wife then filed her bill to have the under-lease set aside:—*Held*, that the gift was to the separate use of the wife, as well during the present as during a future coverture; that the under-lessees from the purchaser must be treated as having notice of the wife's interest; and that the under-lease to the purchaser should be set aside, but without costs. *Steedman v. Poole*, 193

2. To a bill by a husband, claiming, in his marital right, against his wife and the trustees of their marriage settlement, part of the furniture of a house which was let furnished at an entire rent, the whole of which had, from the time of the marriage, been received by the wife for her separate use, and seeking to have the rent apportioned, the answer of the wife

set up a parol agreement, by the husband, made before the marriage, that the wife should possess the furniture in question for her separate use, although it was not included in the marriage settlement:—*Held*, that the plaintiff had no equity to sustain a suit for an account of an apportioned part of the past rents. *Simmons v. Simmons*, 352

3. That the plaintiff had no equity to sustain a suit for the apportionment of the rent of the house and furniture, in respect of his alleged interest in the latter, unless it appeared that he was by some reason precluded from bringing his action at law to recover the furniture which he claimed; and that the plaintiff not having shown that he had no remedy at law, the bill must be dismissed. *Ib.*

4. Although a parol agreement, before marriage, that particular chattels of the wife shall be possessed by her for her separate use, is not binding upon the husband; yet, if the agreement be acted upon by the chattels being placed under the dominion of the trustees, and treated as separate property, the agreement may be made effectual. *Ib.*

5. Although a bequest of stock for a married woman, for her separate use for her life, and, after her decease, for her appointees by deed or will, directs that any appointment by deed shall not come into operation until after her death, the married woman is not thereby restrained from anticipation, or prevented from appointing the fund by an irrevocable deed. *Alexander v. Young*, 393

See COVENANT.

IMPROVEMENTS.

1. To a bill which alleged (amongst other things) that the plaintiffs, believing themselves to be entitled under a devise to a dwelling-house and shop, entered into an agreement for a lease of the premises, then in a dilapidated state, to a tenant, in pursuance of which the tenant expended money in pulling down and rebuilding the premises,—that the defendant, who was, as it afterwards appeared, the actual owner of a moiety of the property, knew the true state of the title, and had made a claim to the whole property, which claim he repeated a few days before the improvements were commenced,—that he knew also that the improvements were being made, and that

the plaintiffs and their tenant were acting under a mistake, and, nevertheless, permitted the works to be carried on without any objection during their progress—and praying that the defendant might be decreed to confirm the lease, and in the meantime be restrained from evicting the tenant;—a demurrer for want of equity was allowed. *Master or Keeper, Fellows and Scholars of Clare Hall v. Harding*, 273

2. *Held*, also, that in such a case the principle is the same whether the owner and the party making the expenditure by mistake are strangers, or tenants in common of the property. *Ib.*

3. That the owner having once and recently given notice of his claim to the property was not, in order to exclude any equity in respect of the expenditure on the ground of mistake by the party in possession, or of acquiescence on his own part, bound again to assert it when the expenditure began, or while it was going on. *Ib.*

4. That, in order to exclude such equity it was not necessary that the notice of his claim, given by the claimant to the party in possession, should disclose any particulars relating to his title; nor, if the claim which he made exceeded what he was entitled to, was the party in possession justified in disregarding it, or supposing it to be unfounded. *Ib.*

See ACQUIESCENCE.

INCOMPETENCY.

See WITNESS, 6.

INFANT.

1. The circumstance that infants are residing in two different parts of the kingdom, is not a sufficient ground for dispensing with the practice for assigning a guardian *ad litem* by a commission, or upon their appearance. *Mower v. Orr*, 417

2. A party entering upon, and taking the rents and profits of, an infant's estate, may be sued at law as a trespasser, or in equity as the bailiff, guardian, and trustee of the infant, at the election of the plaintiff. *Wyllie v. Ellice*, 506

3. Where it appears that several per-

sons entered on and held the estate of an infant, one of such persons cannot be sued by the infant in equity as his bailiff, guardian, or trustee, for an account of the rents and profits of the estate, without making parties to the suit the others of such persons. *Ib.*

INHERITANCE.

See ALIEN, 1, 2.

INJUNCTION.

1. In a suit for an injunction against the use by the defendants of a certain name and mark upon their goods, the defendants admitted the use of the name and mark, but said that it was their true name, and that they were entitled so to use it: the plaintiffs, without moving for the injunction, went into evidence in equity. At the hearing of the cause, the Court being of opinion that the evidence did not establish the plaintiffs' right to the injunction, but that it showed the defendants to have used the name and mark in question on their goods, in a manner which might lead purchasers to understand falsely, that the goods were manufactured by the plaintiffs—gave the defendants the option either of having the bill dismissed against them, without costs, or of having the right tried at law. *Rodgers v. Nowell*, 325

2. The bill being retained for a year, with liberty to the plaintiffs to bring an action at law, the action was brought, and the plaintiffs recovered a verdict. The Court then granted the injunction, and ordered the defendants to pay the costs at law and in equity, except the costs of the evidence in equity. *Ib.*

3. Upon a bill for an injunction to restrain the defendants from using a certain mark, alleged to be fraudulently used by them on goods, in order untruly to denote that such goods were manufactured by the plaintiffs, the Court at the hearing retained the bill, and gave the plaintiffs liberty to bring an action, but refused to direct any admissions to be made by the defendants on the trial of such action. *Ib.* 337

4. On a bill for an injunction to protect the plaintiffs' coal mines from injury by the water flowing to them from the defendants' colliery, the Court on motion granted an injunction restraining the defendants from working their coal mines

in any places which might injure or endanger the plaintiffs' mines until answer, or further order, but gave no directions for the trial of the right in a court of law. The parties went into evidence, and the cause was brought to a hearing, when the Court refused, until the plaintiffs had established their right at law, to make the injunction perpetual, but retained the bill for a year, giving the plaintiffs liberty to bring such action as they might be advised, continuing the injunction in the meantime. *The Duke of Beaufort v. Morris*, 340

5. *Quære*, whether the present practice of the court is in any case upon motion (not ex parte) to grant an injunction for the purpose of protecting a legal right which is not admitted, without providing by the order for the trial of the right in a court of law. *Ib.*

6. The circumstance that the defendants submit to an injunction granted upon an interlocutory application, and that none of the acts complained of were subsequently repeated, is no objection to the injunction being made perpetual at the hearing of the cause. *Id.* 350

See ACQUIESCENCE.
BILL OF EXCHANGE.
IMPROVEMENTS, 1.
OUTSTANDING TERM.
RECEIVER, 4.

INQUIRY.

Considerations which influence the Court in directing inquiries at the hearing of a cause to perfect the evidence on behalf of the plaintiff; and distinction where the inquiries are sought to show that the plaintiff is entitled to relief in the suit, and where the title to some relief being proved, the inquiries are to be directed only to the measure of that relief. *Simmons v. Simmons*, 360

See EVIDENCE, 6.
PLEADING, 1.

INSOLVENT DEBTOR.

1. The clauses of the statute for the relief of insolvent debtors, which provide that, in case the insolvent shall be entitled to any copyhold or customary estate, the assignment to or certified copy of the appointment of the assignee shall be entered on the court rolls of the manor, and that

the assignee shall, with all convenient speed, make sale of all the estate and effects of the insolvent, are not mandatory, but are directory only. *Cole v. Coles*, 517

2. The omission of the assignees of an insolvent debtor to sell or take possession of the copyhold estate of the insolvent, or to cause an entry of the assignment or copy of the appointment of the assignee to be made on the court rolls, or to possess themselves of the copies of court roll for a period of nineteen years after the insolvency, whereby the insolvent is enabled to retain the property and hold himself out as the owner, and mortgage it for value to a person who had no actual knowledge of the insolvency, does not constitute an equitable ground for giving such mortgagee a charge in priority to the title of the assignee. *Cole v. Coles*, 517

3. An appointment of a person claiming to be a creditor of an insolvent debtor, assignee of his estate and effects in the place of a deceased assignee, on condition that the person so appointed shall prove his debt by affidavit on taking out his appointment, such debt having been afterwards proved accordingly, is a valid appointment, entitling the party so appointed to sustain a suit for the purpose of recovering property claimed as part of the estate of the insolvent. *Ib.*

See WITNESS, 14.

INTEREST.

A firm in India collected the estate of a deceased person, in that country, under a power of attorney from the administratrix in England, and remitted the amount to their agents, a firm in London, with an order to pay it to the administratrix upon receiving a proper discharge. The London firm declined to pay over the fund to the administratrix, on the ground that the letters of administration which she had obtained did not bear a sufficient stamp. A suit was soon afterwards instituted by other persons, claiming to be next of kin of the intestate, for the administration of the estate, and to restrain the payment to the intestate. The London firm were defendants to the suit. No application was made to pay the money into Court for upwards of ten years, and during the whole of this period it remained in the hands of the London firm, mixed with their own moneys:—*Held*, that the Lon-

don firm was not liable to pay interest on such moneys. *Wolfe v. Findlay*, 66

INTESTACY.

See COVENANT.
● HEIR AT LAW.

IRREGULAR ORDER.

An order made by the Master, although obtained irregularly, and ex parte as to some of the parties in the cause, cannot be treated by them as a nullity. *Hughes v. Williams*, 71

SEE ORDER, 3.

ISSUE.

See CONSTRUCTION, 4, 5, 7, 8.
RE MOTENESS, 4.

JOINT-STOCK COMPANY.

See TITLE.

JUDGMENT.

See OUTSTANDING TERM.

JURISDICTION.

See BILL OF EXCHANGE.
BROKER, 5.
DEBTOR AND CREDITOR, 2.
HUSBAND AND WIFE, 2.
IMPROVEMENTS, 1.
MOTION, 2.
OUTSTANDING TERM.
SHIP, 1.

LACHES.

See SPECIFIC PERFORMANCE, 1, 3, 4.
VENDOR AND PURCHASER, 5.

LANDS CLAUSES CONSOLIDATION ACT.

See SPECIFIC PERFORMANCE, 8.
STAT. 8 & 9 VIOT. c. 18.

LEASEHOLD ESTATE.

See VENDOR AND PURCHASER, 3.
VOL. VI.

LEGACY.

See CONSTRUCTION, 1, 10, 11, 12.
PLEADING, 1.

LEGATEE.

See PARTIES, 2, 3.

LETTERS OF ADMINISTRATION.

See AMENDMENT, 2.
EVIDENCE, 5.

LIEN.

1. The lien of a solicitor in the cause held not to entitle him to withhold an original order of the Court in which there was an accidental error that required correction. *Bird v. Heath*, 236

2. The term "lien" does not properly describe the right of a part owner to be reimbursed, out of the gross freight, the amount of expenses incurred in the prior repair and outfit of the ship. *Green v. Briggs*, 400

See SHIP, 2.
STAMP, 3.
VENDOR AND PURCHASER, 3.

LIFE ESTATE.

See REMOTENESS, 1, 3.

LIFE INTEREST.

See VENDOR AND PURCHASER, 3.

MASTER.

See PLEA, 1.

MASTER OF SHIP.

See SHIP, 2, 3.

MEETING-HOUSE.

See STAT. 7 & 8 VIOT. c. 45.

MINES.

See INJUNCTION, 4.
TITLE.

MINUTES.

See PRIVILEGE.
REGISTRAR.

MISREPRESENTATION.

See BROKER, 1.

MISTAKE.

• See IMPROVEMENTS, 1, 2, 3, 4.
VENDOR AND PURCHASER, 6.

MORTGAGOR AND MORTGAGEE.

1. In 1816, the mortgagee, under a mortgage created some years before, entered into possession of the mortgaged premises, and in 1827 he executed a transfer of his mortgage to another. The transferee thereupon entered into possession, and in 1828 executed a transfer of his mortgage to a second transferee who then entered into possession. The mortgagor was not a party to either transfer, and had not, from the time the original mortgagee entered into possession, received any acknowledgment in writing of his equity of redemption. In 1833, the Statute of Limitations (3 & 4 Will. 4, c. 27, s. 28) was passed and barred all suits for redemption after twenty years' possession by the mortgagee, and no acknowledgment in the meantime of the right of redemption given to the mortgagor or his agent, in writing, signed by the mortgagee. In 1846, the representative of the mortgagor filed his bill for redemption against the representatives of the second transferee:—*Held*, that the statute operated retrospectively, by taking from the mortgagor the benefit of the acknowledgment which had already been made of the mortgage title in the transfers of 1827 and 1828; and that the suit (as to that estate) was therefore barred. *Bachelor v. Middleton*, 75

2. A. mortgaged three houses (23, 26, and 27) to B., and afterwards contracted to sell 23 (one of the houses) to C.; C. paid the purchase-money to A. under the contract, but without obtaining a conveyance, and with constructive notice of the prior mortgage to B. C. afterwards paid off what was due to B. upon his mortgage, and having taken a transfer of the mortgage, filed a bill against the devisee of A. and several mortgagees, under subsequent mortgages made by A.,

which included the houses 26 and 27, and other property, and obtained a decree for the specific performance by the devisees of A. of the contract of sale as to the house 23, and for the successive foreclosure of all the subsequent mortgages, and the devisee of A., in default of their redemption of the houses 26 and 27. *Sober v. Kemp*, 156

3. A. and B., in 1838, filed their bill for the administration of an estate, of the residue, of which they were each entitled to one third. In 1840 they changed their solicitor in the cause, and appointed F. as such solicitor, who so continued until 1843, when they again changed their solicitor. F. then brought his action against A. (B. having gone out of the jurisdiction) for the amount of his bill of costs, and, in June, 1844, he recovered and entered up judgment in such action. In June, 1845, F. filed his bill for foreclosure under the statute 1 & 2 Vict. c. 110, as against A.'s third part of the property, the subject of the first suit. In July, 1846, F. obtained the common decree for foreclosure against A., and default being made on the 23rd of March, 1847, the order for foreclosure was made absolute. The order absolute was then enrolled. A. had no property except that to which she was entitled in the first suit, but the value of the property to which she was entitled in that suit was three or four times the amount of F.'s judgment-debt and costs. The Master had made his report in the first suit, and the cause stood for hearing on further directions and on exceptions, when, on an application in June, 1847, the Court enlarged the time appointed by the Master for the payment of the debt and costs, notwithstanding the order absolute, and notwithstanding its enrolment. *Ford v. Wastell*, 229

4. The representative of a mortgagor, who had obtained a decree for redemption, ordered, on the petition of the mortgagee, to produce the original decree for the purpose of correction. *Bird v. Heath*, 236

5. The mortgagee of a fund in Court is entitled to the expense of obtaining a stop-order on the fund in a case in which he is empowered by the mortgage-deed to apply to the Court for that purpose, but such expenses are not allowed by the taxing-master under the common order to tax the costs of the mortgagee. *Waddilove v. Taylor*, 307

6. The costs of the petition and order under the statute 1 Will. 4, c. 60, for the conveyance of a mortgaged estate to the mortgagor, or his representatives, upon payment of the mortgage-money, are to be borne by the mortgagor or his estate, although such proceedings were rendered necessary by the circumstance that the mortgagee had devised the legal estate in the mortgaged premises to three trustees, one of whom could not be found. *King v. Smith*, 473

See BROKER, 1.
BUILDING SOCIETY.
COSTS, 2.
DECREE.
INSOLVENT DEBTOR, 2.
PARTIES, 9.
RECEIVER, 4.
SHIP, 4.

MORTMAIN ACT.

1. Upon an information for the appointment of new trustees of a Dissenters' meeting-house, on the ground that the parties in possession had excluded persons who, according to the trusts, were entitled the use of the premises, and had admitted others to the use of the same who were not entitled thereto: the Court made a decree for the appointment of new trustees, notwithstanding the deed declaring the trust was not enrolled according to the provisions of the Mortmain Act, (9 Geo 2, c. 36,) and notwithstanding the defendants who had (permissively) the possession and use of the premises objected, at the hearing, that the deed was void under the statute; the defendant who had the legal estate admitting the trust, and submitting to act as the Court should direct. *Attorney-general v. Ward*, 477

2. The Court will make a decree for the appointment of new trustees of lands, for a charitable use, although the deed originally declaring the use be not enrolled under the Mortmain Act, if the trustees in whom the legal estate is vested admit the trust, and do not object that the deed is void under the statute, but submit to act under the direction of the Court. *Id.*

See EVIDENCE, 4.
STAT. 7 & 8 VIOT. c. 45.

MOTION.

1. Where a motion for the discharge of a prisoner is made before the Vice-Chancellor in a Rolls' cause, or in a cause attached to another branch of the Court, the Vice-Chancellor cannot (unless specially authorized) make an order on such application, although the prisoner be brought before him by habeas corpus. *Semble. Newton v. Askew*, 321

2. Where the question of equitable assistance depends on the legal right, and the legal right is denied by the answer, the plaintiff may move for leave to try the legal right, without asking for an injunction in the meantime. *Rodgers v. Nowill*, 332

3. Special leave given to the plaintiffs to move for liberty to amend their bill, by striking out the name of one such plaintiffs and making him a defendant:—*Held* to authorize a motion by such of the parties as were to remain, excluding the plaintiff whose name was to be struck out; and the Court made the order, without prejudice to a motion then pending, for a receiver in the original cause. *Hart v. Tulk*, 612

See AFFIDAVIT OF SERVICE.
AMENDMENT.
COSTS, 3.
INJUNCTION, 5.
ORDER, 1, 2, 3.
RECEIVER, 2, 3, 4.
SERVICE.
WITNESS, 9, 12, 13.

MUNICIPAL CORPORATION.

See STAT. 8 & 9 VIOT. c. 18.

NEGLIGENCE.

See TRUSTEE AND CESTUI QUE TRUST, 1, 2

NEXT OF KIN.

See HEIR-AT-LAW.

NOTICE.

See HUSBAND AND WIFE, 1.
IMPROVEMENTS, 1, 3, 4.
ORDER, 4.
PRIORITY OF INCUMBRANCES.
SPECIFIC PERFORMANCE, 8.
STAMP, 3.

NOTICE OF MOTION.

See MOTION, 3.
ORDER, 1, 2.

OPENING BIDDINGS.

See VENDOR AND PURCHASER, 4.

ORDER.

1. An order made upon affidavit of service of the notice of motion must not depart from the terms of the notice, even though it be less extensive than the notice, if such less extensive order may be more prejudicial to the party against whom it is made than would have been the larger order which was asked. *Hut-ton v. Hepworth*, 315

2. The notice was, that the Court would be moved to dismiss an original and a supplemental cause, or to direct the original cause to be put in the paper for hearing: the order made upon affidavit of service was, that the supplemental cause should be dismissed, and the original cause put in the paper: the Court, upon motion, discharged the order. *Ib.*

3. Upon the motion of B, the Court ordered that, upon his paying the purchase money into Court, he should be substituted as purchaser in the place of A., and that A. thereupon should be discharged from his purchase. B. having omitted to draw up the order, the plaintiffs in the cause did so, and caused a direction to be inserted for payment of the purchase money by B. within twelve days after service of the order, in which form, (after notice to B. to attend at the Registrar's office,) the order was passed. On the motion of B., the Court discharged the order, with costs. *Miller v. Smith*, 609

4. An order made upon notice for leave to the plaintiffs to amend their bill, giving security to the Clerk of Records and Writs for the costs of the defendants of the suit, already incurred, was varied *ex parte* by directing the costs of the defendants to be taxed and paid to them by the plaintiffs, reserving the question how they were ultimately to be borne; the variation not being such as could prejudice the absent defendants. *Hart v. Tulk*, 611

5. An order made by the Court, and

correctly drawn up, will not in all cases be discharged solely on the ground that it was passed by the Registrar, without notice to the other parties in the cause. *Ib.*

See LIEN, 1.
MOTION, 3.

ORDER FOR PAYMENT OF MONEY.

See STAMP.

OUTFIT.

See SHIP, 7.

OUTLAWRY.

After a plea of outlawry of the plaintiff, the outlawry was reversed, and it was held that the plaintiff was entitled to an order of the Court for the issue of a new subpoena against the defendant, and that, upon service of such subpoena, and payment of 20s. costs, (as directed by Lord Clarendon's Order,) the defendant should answer the bill, and that the costs of the motion must be paid by the plaintiff. *Hunter v. Nockolds*, 459

OUTSTANDING TERM.

Although the Court will, by decree, restrain the setting up of an outstanding term to prevent the fair trial of a legal right, yet, after the trial of an ejectment has taken place, and a term has been set up whereby the trial of the merits of the case was prevented, and the party using it obtained a verdict and judgment, a suit cannot be sustained to set that judgment aside; nor will the fact, that the communications made before the trial by the party, who so gained the advantage at law, led the other party to believe that the substantial question of the title would be tried in the ejectment, enable him to sustain a suit for such a purpose; but if there be any impediment to the trial of the legal right in another action of ejectment, a suit may be sustained for relief by removing that impediment to the trial of the right in such future action. *Master or Keeper, Fellows and Scholars of Clare Hall v. Harding*, 273

PARTIES.

1. To a suit by one or more cestuis que trust against trustees, alleging that the trust fund had been invested on improper security, and seeking to have it restored, all the cestuis que trust of the fund must be parties; and if the fund be held in trust for a class of persons, there must, before the cause is heard on the question between the plaintiffs and the trustees, be evidence that all the members of the class are before the Court. *Philpston v. Gatty*, 26

2. In a suit by the devisee of a mortgagor to redeem the mortgaged estate, where the defendant, the alleged mortgagee, claims an absolute title by virtue of the Statute of Limitations, legatees whose legacies are, under the will of the mortgagor, charged on the mortgaged premises, are necessary parties. *Batchelor v. Middleton*, 78

3. To a suit by three out of four residuary legatees, to recover three-fourths of a sum of stock which the executors had omitted to get in, and which had been transferred to the Commissioners for the Reduction of the National Debt, under the statute 56 Geo. 3, c. 60, the legatee entitled to the other fourth part of the stock is a necessary party. *Hunt v. Peacock*, 361

4. Where property was conveyed to four trustees for such of the creditors of a firm as should execute the deed, and twenty-six creditors (including the four trustees) executed the deed, a suit instituted seventeen years afterwards by some of the creditors, on behalf of themselves and the others, was sustained against the trustees, they objecting that it was defective for want of the other creditors as parties. *Bateman v. Margison*, 496

5. In a suit by some of many creditors, on behalf of themselves and the others, for an account of property which had been vested in the defendants, the trustees, for the benefit of such creditors, and one of the trustees died after answer, the other trustees are not necessary parties to the bill of revivor, or revivor and supplement, against the representatives of the deceased trustee. *Ib.*

6. The author of the trust, or his personal representative, is a necessary party to such a suit; and he is not regularly or properly a party thereto by being a de-

fendant to a bill of revivor, or revivor and supplement, against the representatives of a trustee who died after the institution of the suit, even though all the trustees are (unnecessarily) parties to such bill of revivor, or revivor and supplement; he must be made a party to the original bill, or to a bill in which the trustees are all properly defendants. *Ib.*

7. A person, not a trustee, who is a party to a breach of trust committed by a trustee, may or may not (at the option of the plaintiff, a cestui que trust) be made a defendant to a suit against the trustee in respect of such breach. *Ib.*

8. The Attorney-general does not, as a party in the cause, sufficiently represent the estate of an illegitimate person who died intestate, so as to enable the Court to dispense with a legal personal representative of such person, duly constituted in the Ecclesiastical Court, as a party. *Bell v. Alexander*, 543

9. In a suit between a part owner and managing owner of a ship and the mortgagees of the shares of other part owners, to determine the question of right to the freight and earnings of the ship, the same being claimed by the plaintiff towards the expenses of repairs and outfit preparatory to the voyage, and by the mortgagees as applicable, in the first instance, to the payment of their debt, the assignees of the mortgagors, the other part owners, were held to be necessary parties, and not to be entitled to their costs. *Green v. Briggs*, 632

See ADMINISTRATION SUIT, 2, 5.

INFANT, 3.

PLEADING, 1.

TRUSTEE AND CESTUI QUE

TRUST, 2.

WITNESS, 9.

WITNESS, 11, 12, 13.

PARTNERSHIP.

1. Articles of partnership between two partners as brewers, malsters, &c., covenanting with each other that they and their respective executors and administrators would continue partners for twenty-one years, determinable upon the death of both partners, unless their respective representatives should agree to continue the business for the residue of the term; and empowering either partner to sell his share in the partnership property, (offering it first to the other part-

ner,) so that the purchaser should not be entitled to the possession of the partnership property until the expiration of the partnership, without the consent of the other partner; empowering, also, each partner either in his lifetime or under his will, to introduce one or more relations, being sons, brothers, or nephews, into the partnership, to take all or a portion of his share, during the continuance of the partnership; and providing, that, in case of the death of either or both partners during the term, after having introduced such relation, the person so introduced should be considered as the original partner; providing, also, that in case of the death of either partner during the term, without having introduced such relation, the business should be carried on by the surviving partner, and the executors, administrators, or trustees of the deceased partner; but making no provision for the case (which happened) of the death of one partner during the term, and his executors or administrators refusing to be concerned in the business with the surviving partner, and calling for an immediate dissolution, and a sale and distribution of the partnership property, the surviving partner not consenting to such dissolution or sale:—*Held*, in a suit by the executors of the deceased partner against the survivor, for a dissolution, that the provisions in the articles for the continuance of the partnership during the term of twenty-one years could not be enforced in equity by way of specific performance of the partnership contract against the representatives of a deceased partner, either by way of relief in a suit in which such surviving partner was plaintiff, or by way of protection in a suit in which he was defendant: and, inasmuch as the articles could not be so enforced, the plaintiffs, the executors of the deceased partner, repudiating the partnership, were entitled to a decree for a dissolution; but that such relief would be given to them in equity, subject to any legal right which the surviving partner had, to recover damages against the executors of the deceased partner for a breach of the covenants contained in the articles; and that the amount of any damages which might be recovered in such an action must be added to the credit side of the account of the surviving partner, to be taken under the decree.

Downs v. Collins, 418

2. The option reserved to the executors of the deceased partner to enter into the partnership with a surviving partner must be accompanied by the obligation

on the part of the surviving partner to admit them; and, unless the option be confined to the representatives of the partner who shall die first, the surviving partner must have the option of entering into the partnership with the representatives of the deceased partner, with the same accompanying obligation on their part to admit him. 1*b*.

See BANKRUPTCY, 1, 2, 3.
SHIP, 6.
SPECIFIC PERFORMANCE, 6.

PART OWNER.

See SHIP, 6, 7.

PAYMENT.

See EXECUTOR, 2.
ORDER, 4.

PAYMENT INTO COURT.

See PLEADING, 1.

PAYMENT OF LEGACIES.

See ADMINISTRATION SUIT, 1.
EVIDENCE, 1.

PAUPER.

See COSTS, 2.

PERPETUAL INJUNCTION.

See INJUNCTION, 2, 4, 6.

PETITION.

See PLEADING, 2.

PLAINTIFF.

See COSTS, 1.
MOTION, 3.
ORDER, 4.
SHIP, 5.
SOLICITOR, 1.
WITNESS, 11, 14.

PLEADING.

1. In a suit by a legatee claiming several legacies under the will and codicils of the testator, against the executor, naming as a defendant another legatee, who under one construction of a bequest would be entitled to an interest in one of the legacies claimed by the plaintiffs, the plaintiffs alleged by their bill that the other legatee so named as a defendant was out of the jurisdiction, but did not prove it; and, upon motions *ex parte*, supported by affidavits, that such other legatee could not be found to be served with process, obtained leave to file a replication, and afterwards to set down the cause against the defendants who had appeared and answered. At the hearing, the absence of the other legatee was urged by the executor as a preliminary objection to the hearing of the cause, but the Court heard the cause upon the questions of construction on the bequests in which the absent legatee was not interested, and reserved the consideration of the question as to the bequest, in which it was suggested that the absent party had an interest, directing that legacy to be brought into Court, and also directing an inquiry before the Master, whether the absent party was out of the jurisdiction. *Mores v. Mores*, 125

2. The proper form of proceeding to recover stock and dividends, unclaimed for ten years, and carried over to the account of the Commissioners for the Reduction of the National Debt, under the statute 56 Geo. 3, c. 60, is, by petition to be served upon the Attorney-general and the Commissioners, and not by bill in the first instance; and if there be conflicting claims to the fund, the Court will then give directions for the trial of the rights of the parties between themselves, either by suit or otherwise. *Hunt v. Peacock*, 361

See BANKRUPTCY, 1, 2.

BILL.

DISCOVERY.

PLEA.

SHIP, 5.

SOLICITOR, 1.

PLEA.

1. A defendant, residing abroad, had obtained two orders from the Master for time "to answer," not including the expression that leave was given "to plead or demur." The defendant's solicitor, on

application for a third order, produced before the Master a document which, he stated, was the draft of the answer, which answer would be filed without delay, and the Master gave two months further time. The defendant afterwards filed a plea to the bill:—*Held*, that the plea was an answer, and satisfied the terms of the orders giving time to answer. *Hunter v. Nockolds*, 12

2. A plea to a bill of revivor, by the representatives of a deceased defendant, that the party whom they represent was never served with a subpoena to appear and answer, and did not appear to nor answer the original bill, overruled, as insufficient in substance—not excluding the fact that the deceased party might by other means have been bound by the proceedings in the original cause. *Ravilins v. Moss*, 604

See OUTLAWRY.

POSSESSION.

See MORTGAGOR AND MORTGAGEE, 1.
RECEIVER, 2.
SPECIFIC PERFORMANCE, 3, 5.

POWER.

See APPOINTMENT.—TRUSTEE AND CESTUI QUE TRUST, 6, 7.

PRACTICE.

See AFFIDAVIT OF SERVICE.

AMENDMENT.

APPEARANCE.

COSTS, 1, 2, 3.

DECREE.

ENROLMENT.

GENERAL ORDERS.

HABEAS CORPUS.

HEARING.

INFANT.

INJUNCTION.

IRREGULAR ORDER.

MINUTES.

NOTICE OF MOTION.

ORDER.

PARTIES, 1.

PAUPER.

PETITION.

PLEADING, 1.

PLEA, 1.

REPLICATION.

SALE UNDER DECREE.

SETTING DOWN CAUSE.

See SERVICE.
SOLICITOR.
STOP ORDER.
SUBSTITUTED SERVICE.
TITLE DEEDS.
TREVERING NOTE.
WITNESS.

PRINCIPAL AND AGENT.

See BROKER.

PRIORITY OF CONTRACT.

See VENDOR AND PURCHASER, 1.

PRIORITY OF INCUMBRANCERS.

Notice of a charge to an indefinite amount although the notice be inaccurate as to the particulars or extent of the charge, is sufficient to put upon inquiry a party dealing for the property subject to the charge; and if the actual charge afterwards appears to be incorrectly described in the notice, it is nevertheless sufficient, as a ground for giving priority for the true amount of the charge as against the party who received the incorrect notice, but made no inquiry. *Gibson v. Ingo*, 124

See INSOLVENT DEBTOR, 2.
SHIP, 4.

PRISONER.

See MOTION, 1.
PRIVILEGE.

PRIVILEGE.

A party in a cause, who is interested in a decree which has been pronounced, is privileged from arrest in attending the Registrar's office, on passing the minutes of the decree. *Newton v. Askeu*, 319

PRODUCTION OF DEEDS.

See TITLE DEEDS.

PUBLICATION.

See SETTING DOWN CAUSE.

RAILWAY COMPANY.

See ACQUIESCENCE.
SPECIFIC PERFORMANCE.

REAL ESTATE.

See ALIEN, 1.

RECEIVER.

1. A receiver appointed to get in property, part of which he finds in the possession of another receiver, ought not to take proceedings to deprive the latter of such possession, without the authority of the Court. *Ward v. Smith*, 312

2. A motion ought not to be made for committal on the ground of a disturbance of the possession of a receiver, when the object of the motion is merely to compel the payment of costs, after the question with respect to the possession of the property has been settled. 1b.

3. Where there were two suits for administration, and a motion for a receiver, in each suit came on upon the same day, the receiver was appointed in both suits, and the Court gave the carriage of the order to the plaintiffs by whom the first notice of motion for the receiver had been given. *Hart v. Tulk*, 611

4. Upon the bill of an equitable mortgagee, leave was given to serve the defendant, the mortgagor, before appearance, with notice of motion for a receiver, (the bill not asking for an injunction:) and the order was made, upon affidavit of service, for the appointment of the receiver, with liberty to the parties to propose themselves, according to the notice. *Meadon v. Sealey*, 620

See MOTION, 3.

RECITAL.

See EVIDENCE, 7.

REDEMPTION.

See BUILDING SOCIETY.
COSTS, 2.
DECREE.

REFERENCE.

See DEURER, 2.

REGISTRAR.

See ORDER, 3, 5.

PRIVILEGE.

SETTING DOWN CAUSE.

RELEASE.

See DEBTOR AND CREDITOR, 1, 2.

REMAINDER.

See CONSTRUCTION, 15.

REMOTENESS.

1. Devise and bequest of freehold and leasehold estates to trustees, upon trust, after paying certain annuities, to settle the same, so that, as nearly as the rules of law and equity would permit, the testator's six younger children should receive the rents and profits in equal shares during their lives, with benefit of survivorship if any of them should die without leaving issue, and, if any should die leaving issue, that the child or children of him or her so dying, during the lives of his said other children and of the survivor, should take the share of him or her so dying of the said rents and profits; and that, upon the death of all his said other children, as to the leasehold estates, the same to go and belong to the issue of his said other children for their respective lives, in equal shares, with benefit of survivorship; and as to the freehold estates, the issue of his said children to take the rents, profits, and proceeds thereof for their respective lives, in equal shares, with benefit of survivorship in case of the death of any of such issue without leaving issue, and if any of such issue of his said children should die leaving issue, the child and children of him or her so dying, during the lives of such issue of his said children and of the survivor of them, should take the share of him or her so dying; and after the death of all the issue of his said children, then, as to the said leasehold estates, the same to go and belong to the child and children of such issue absolutely as tenants in common; and as to the said freehold estates, in case the issue of his said children, or any of them, should leave

issue living at the decease of the last survivor of the said issue, then that the same should be to the use of the child and children of the bodies of the issue of his said children, and of the heirs of the body and respective bodies of such child and children, and, if more than one, equally to be divided amongst them as tenants in common; and if there should be a failure of issue of the body or bodies of any such child or children, then, as to the original and accrued shares of such child or children whose children should so fail, to the use of the remaining and other and others of the said children, and the heirs of the body or bodies of such remaining and other children, and, if more than one, equally as tenants in common; and in default of such issue of his said children, to the use of the right heirs of the testator. The six younger children of the testator survived him. Some of them had children at the time of his death, and some had children born after his death:—*Held*, that the six younger children of the testator took life interests in both the freehold and leasehold estates, with remainder, as to the freeholds, to the children of such younger children as tenants in common in tail, with cross remainders between and among them, and the ultimate remainder to the testator's right heirs; and, *semble*, that the same children of such younger children (after the decease of the last survivor of their respective parents, the tenants for life) take absolute interests in the leaseholds.
Williams v. Teale, 239

2. That, in considering the validity of the limitations, the state of the family at the death of the testator (and not at the date of his will) is to be regarded; and, therefore, if a gift be to such of the children of a particular parent as shall attain a greater age than twenty-one years, and the parent die in the lifetime of the testator, and the class be ascertained at the testator's death the gift is valid.
Id.

3. That the limitation to the unborn children of the testator's children for their lives was not void for remoteness only, because it was a gift to persons who might be unborn at the death of the testator.
Id.

4. That where, upon the decease of the testator's "children," the estate was given to the "issue" of such children, and where it was given over in case the testator's "children" should die "without leaving issue," and in like uses of the

word issue, the word "issue" must be read "child or children," although, in other parts of the will, it might be necessary to read the word "issue" in a different sense.

Id.

REPAIRS.

See SHIP, 8.

REPLICATION.

Orders giving leave to the plaintiff to file a replication, and to set down the cause as against the defendants who had appeared and answered; upon affidavit that another defendant could not be found to be served with process, the plaintiff being unable to make the suit effectual against such other defendant under any of the General Orders of the Court. *Mores v. Mores*, 127

See GENERAL ORDER, XXIII. OF OCTOBER, 1842.

PLEADING, 1.

RESTRAINT ON ALIENATION.

See HUSBAND AND WIFE, 1.

REVERSAL OF OUTLAWRY.

See OUTLAWRY.

REVIVOR.

See PLEA, 2.

SUBSTITUTED SERVICE.

SALE UNDER DECREE.

See VENDOR AND PURCHASER, 4.

SECURITY.

See ORDER, 4.

SEPARATE USE.

See HUSBAND AND WIFE.

SERVICE.

Leave to serve notice of motion upon

defendants before their appearance in the cause, does not include also leave to give short notice of the motion; and if other than the regular period of notice be given, leave for that purpose must be obtained, and will not be implied from the distance of the place of service. *Hart v. Tulk*, 611

See COSTS, 1.

MOTION, 3.

RECEIVER, 4.

SUBSTITUTED SERVICE.

TRAVELLING NOTE, 1, 2.

WITNESS, 8, 9.

SETTLEMENT.

See DECREE, 2.

SETTING DOWN CAUSE.

1. Where one defendant had, without notice to his co-defendants, obtained an order from the Master to enlarge publication, and before the enlarged time expired, another defendant knowing of the order, set down the cause for hearing; the cause was ordered to be struck out of the Registrar's book, with costs to be paid by the defendant who had set it down. *Hughes v. Williams*, 71

2. Where a bill has been retained at the hearing, with liberty for the plaintiff to bring an action, it is not irregular for the plaintiff, on having a verdict in his favor, to obtain an order for setting down the cause on further directions or on the equity reserved, although the time at which the defendant may move for a new trial shall not have arrived. *Rodgers v. Nowell*, 338

See PLEADING, 1.

REPLICATION, 1.

SHARES.

See TITLE, 1.

SHERIFF.

See EVIDENCE, 3.

SHIP.

1. There is nothing in the character or nature of the certificate of registry of

a ship which excludes it from the jurisdiction of the Court to decree its delivery as against a party unlawfully detaining it. *Gibson v. Ingo*, 112

2. The master of a ship has no lien on the certificate of registry, either for his wages or for moneys disbursed by him for the use of the ship; nor have the ship-brokers any lien on the certificate of registry for advances made by them to the owner for the use of the ship. *Ib.*

3. The master of a ship has no claim on the accruing freight, either for his wages or for moneys disbursed by him for the use of the ship. *Ib.*

4. Shipbrokers advancing moneys to the owner of a ship for the ship's use, having at the same time notice (by an indorsement on the certificate of registry) of a prior mortgage on the ship, are not entitled to be repaid their advances out of the freight in priority to the mortgagee, although the mortgagee does not take possession of the ship until after she has entered the docks from her homeward voyage. *Ib.*

5. The vendor of a ship, with a covenant for title, retains, after the sale, (in order that he may fulfil his contract, and defend himself against an action brought upon his covenant,) such an interest in the certificate of registry as enables him to sustain a suit for its delivery against a party unlawfully detaining it. *Ib.*

6. Part owners are tenants in common of a ship, but jointly interested in her use and employment; and the law as to the earnings of a ship, whether as freight, cargo, or otherwise, follows the general law of partnership. *Green v. Briggs*, 395

7. A part owner of a ship has a right to require the gross freight to be applied, in the first place, in payment of the expense of the outfit of the ship for the voyage in which the freight was earned, notwithstanding he might sue his co-owners for their proportion of the expenses before the adventure ends. *Ib.*

8. The same rule applies to the expenses of repairs to the hull of the ship, where such repairs were done with a view to the particular adventure in which the earnings were made, and without which that adventure could not have been undertaken; and it would seem that the cir-

cumstance that such repairs are not exhausted in the adventure, does not create any exception to the rule. *Ib.*

See LIEN.

PARTIES, 9.

SHIPBROKER.

See SHIP, 4.

SOLICITOR.

1. Four plaintiffs instituted an original, and two supplemental causes, and three of the same plaintiffs, on a subsequent abatement, filed a supplemental bill by a new solicitor, making the other plaintiff a defendant, who also appeared by another solicitor. On a petition in the four causes, the solicitor in the last supplemental suit, and not the solicitor on the record in the first three causes, was held to be entitled to appear for the plaintiffs. *Ward v. Swift*, 309

2. The order of the 18th October, 1842, is intended to substitute the solicitor for the six clerks, and not to give the solicitor a right to insist, as against his client, upon acting in the cause until removed by the order of the Court. *Ib.*

3. In an action on the case, against an attorney, for negligence, the Court held that the cause of action arose at the time the negligence occurred, and not at the time the negligence was discovered, or the consequential damages ensued. *Smith v. Fox*, 386

See COSTS.

LIEN, 1.

WITNESS, 7.

SPECIFIC PERFORMANCE.

1. A contract for the sale of the vendor's interest in a manor under a lease for lives, was made on the 16th of October, 1840. Objections were taken to the title, and a correspondence between the solicitors of the vendors and purchaser took place, and continued until the 20th of August, 1841, when the purchaser gave notice to the vendors that, the title being defective, he rescinded the contract. The correspondence with reference to the title still proceeded (the purchaser's solicitor claiming his right to insist upon the notice, but giving the vendors two

STOP ORDER.

See MORTGAGOR AND MORTGAGEE, 5.

SUBPCENA DUCES TECUM.

See WITNESS, 2, 3, 4.

SUBSTITUTED SERVICE.

Service of the subpoena to appear and answer a bill of revivor and supplement, upon defendants residing out of the jurisdiction (in Italy,) ordered to be substituted by service upon the solicitors appearing and acting for such defendants in the original suit. *Hart v. Turk*, 618

See TRAVERSING NOTE, 2.

SUBSTITUTION.

See CONSTRUCTION, 1.
PARTNERSHIP.

SUPPLEMENTAL BILL.

See BANKRUPT.
SOLICITOR, 1.
SUBSTITUTED SERVICE.

SURPRISE.

See OUTSTANDING TERM.

SURVIVOR.

See CONSTRUCTION, 1.

TAXATION OF COSTS.

See COSTS, 1.
MORTGAGOR AND MORTGAGEE, 5.

TENANTS IN COMMON.

See IMPROVEMENTS, 1, 2.

TENDER.

See COSTS, 3.

TIME.

See GENERAL ORDER XXIII. OF OCTOBER, 1842.
MORTGAGOR AND MORTGAGEE, 3.
PLEA, 1.
SERVICE.

TITLE.

On a contract for the sale of a share in a mine described as "one 192nd part or half share of the Tresavean mine, in the district of Gwennap, in the county of Cornwall," it is not sufficient for the vendor to show a title to the specified share of the mine as between himself and his co-adventurers, without showing some title in himself and his co-adventurers to the mine of which he had contracted to sell a share. As to the title he must show, *quære. Curling v. Flight*, 41

See CONSTRUCTION, 6.
VENDOR AND PURCHASER, 5.

TITLE DEEDS.

Deeds brought into Court by the executor under the common order for production of documents made in a creditor's suit, will, after the debts are paid, be ordered to be delivered out to the party by whom they were deposited; and the Court refused to order such deeds to be delivered to the plaintiff in the cause, although he was the tenant for life of the estate comprised in the deeds. *Punkett v. Lewis*, 65

TRADE MARK.

See INJUNCTION, 1, 2.

TRAVERSING NOTE.

1. Personal service of the copy of a traversing note may be made, (by leave of the Court, independently of the General Orders,) upon a defendant who has not taken any step to defend the suit either in person or by a solicitor, and where the service cannot, therefore, be made in the manner directed by the 56th General Order of May, 1845. *Laurie v. Burn*, 308

2. Where a bill of revivor and supplement was filed by one of two plaintiffs, and the other plaintiff refusing to join,

was made a defendant, and an appearance entered for him under the XXIXth General order of May, 1845, and such defendant afterwards obtained and served an order changing his solicitors in the cause,—the Court, upon an application by the plaintiff, supported by affidavit that diligent inquiries had been made for such defendant, but he could not be found, ordered, that service upon the new solicitor named in the order for changing solicitors, of a copy of the traversing note, should be deemed good service upon such defendant. *Wallis v. Darby*, 618

TRIAL AT LAW.

See COSTS.

INJUNCTION, 2, 3, 4, 5.

MOTION, 2.

SETTING DOWN CAUSE, 2.

WITNESS, 11, 12, 13.

TRUST.

See INTEREST.

STAT. 8 & 9 VIOT. c. 18.

TRUSTEE.

See INFANT, 2, 3.

PARTIES, 5, 7.

TRUSTS ACT.

See TRUSTEE AND CESTUI QUE TRUST, 5.

TRUSTEE AND CESTUI QUE TRUST.

1. A marriage settlement made in 1811, recited that the husband was entitled to 20,000 rupees, secured by a note of the East India Company; and 10,000 rupees, part thereof, were thereby assigned (with certain property of the wife) to the trustees of the settlement, upon trust, for the husband and wife for their lives, with remainder for the children of the marriage. One of the trustees died six weeks after the settlement was made. The husband died in 1819, and the wife in 1822. The trustees did not, nor did the survivor, take any step during the lifetime of the husband to recover the 10,000 rupees. After they had attained their ages of twenty-one years, the children filed a bill against the surviving trustee and the representatives of the deceased trustee,

for an account of the trust-funds, charging them with the 10,000 rupees. Under a reference to the Master, to inquire whether the defendant might, by due diligence, have received or got in the 10,000 sicca rupees, the defendant produced evidence, showing it to have been the common belief of persons who knew the husband, that he was not possessed of any such property, but no proof was given that the husband was insolvent; and the Court charged the surviving trustee with the fund, and interest from the death of the wife, and directed a reference to inquire the value of the 10,000 rupees at the time of the settlement. *Symes v. Eyre*, 137

2. The representative of the trustee who died six weeks after the making of the settlement was not a necessary party,—such trustee not having possessed any part of the trust-funds, and not being chargeable with the default. *Id.*

3. The survivor of two executors and trustees bequeathed the trust property to A. upon the trusts declared by the original testator, expressing by the same instrument his wish that A. would execute the trusts with fidelity. No direction was given by the will of the original testator as to the appointment of new trustees. On a bill by the cestui que trust for that purpose, *held* that A., though legally in the possession of the trust property, was not a trustee properly constituted, and that the cestui que trust were entitled to have new trustees appointed by the Court. *Mortimer v. Ireland*, 196

4. R., the factor of W., of W. & K., of W. K. & P. of W. P. & C., and W. & B., accepted bills drawn on him by W. & P., they (W. & P.) agreeing that all the goods in R.'s hands, consigned to him by W. & P., either solely or jointly, should be security to R. for the amount of his acceptances. R. sold the goods in his own name. W. afterwards became bankrupt, and the assignees of W. gave notice to the buyers of the goods not to pay R. the moneys due in respect of such sale. All the debts owing for the goods were afterwards, by indenture, to which R. and the assignees of W. were parties, assigned to trustees, upon trust to apply the same as R. might legally do if the assignment had not been made. R. afterwards became bankrupt. The trustees having received the proceeds of the goods filed their bill against the assignees

of W. and R., for the direction of the Court in the execution of the trust. By the decree, the Master was directed to state what bills of exchange had been accepted against the goods, and the amount and particulars of such acceptances, and the amount unpaid, and for that purpose he was at liberty to publish advertisements. Under such advertisements several claims were made before the Master, by K., and by other holders of the bills accepted by R. On further directions, *Held*—that the bill holders had no interest in the proceeds of the goods, except that which might arise from the result of the contract between R. and W. & P.; that if, there had been no bankruptcy, the bill holders could not have sustained a suit to have the proceeds of the goods applied for their benefit; that the happening of the bankruptcies did not affect the equitable rights of the parties; that the doctrine of the case of *Ex parte Waring* established a special mode for the payment of creditors applicable to the administration of the estate in the bankruptcy, but not to the administration of the trust in equity; that the advertisements made under the decree, and which had caused the bill holders to appear before the Master, gave them no right to appear,—and that they were not entitled to appear on further directions; and that the general account as between the estates of W. and of R. being waived by the respective assignees) the assignees of R. were entitled to recover the trust fund, and to administer it in that bankruptcy. *Laycock v. Johnson*, 199

5. Stock standing in the joint names of surviving and deceased trustees may be transferred by the survivors to the Accountant-General under the "Trusts Act," 10 & 11 Vict. c. 96. *In re Parry*, 306

6. A direction by will that the testator's widow shall receive all the income of his real and personal estate, and pay and apply the same to and for the use of herself and the children of their marriage, agreeable and according to her own discretion during her life, confers upon the wife a discretionary power, which the Court will not disturb so long as it is reasonably and honestly exercised. *Costabadie v. Costabadie*, 410

7. Where the disposition of a trust estate amongst certain objects is made by the author of the trust to depend upon the discretion of the trustee, the Court will in a proper suit, inquire into the

manner in which the trust has been administered, and require that such discretion shall be fairly and honestly exercised; and so long as it appears to be so exercised, the Court will not deprive the trustee of the discretionary power which he possesses, or assume itself the exercise of that power; but to avoid a repetition of suits, where there is reason to apprehend that the conduct of the trustee may be liable to question, the Court may require the discretion of the trustee to be exercised under its view. *Id.*

See ADMINISTRATION SUIT, 3, 4.
HEIRLOOMS.
INTEREST.
MORTGAGOR AND MORTGAGEE, 6.
MORTMAIN ACT.
PARTIES, 1, 4, 5, 6.

UNCLAIMED DIVIDENDS.

See PLEADING, 2.

VALUATION.

See ACQUISITION.

VARIATION OF ORDER.

See ORDER, 3, 4.

VENDOR AND PURCHASER.

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1. If a vendor contract with two different persons for the sale to each of them of the same estate, the Court will, *prima facie*, enforce the contract which was first made; and if the party with whom the second contract was made should, after notice of the first contract procure a conveyance of the legal estate in pursuance of the second contract, the Court will, in a suit for specific performance by the first purchaser against the vendor and the second purchaser, decree the latter to convey the estate to the plaintiff. *Potter v. Sanders*, 1

2. A purchaser offered a price for an estate, and the vendor by a letter sent by post and received by the purchaser the day after it was put into the post-office, accepted the offer:—*Held*, that the vendor was bound by the contract from the time when he posted his letter, although it was not received by the purchaser until the following day. *Id.*

3. Sale and assignment of a life interest in leaseholds in consideration of a weekly sum, to be paid to the vendor, during her life, with a covenant by the purchaser, for himself, his heirs, executors, and administrators, to make the weekly payment to the vendor, and to repair and insure the premises, and otherwise perform the covenants in the lease:—*Held*, that the vendor was entitled to a lien on the life interest in the leaseholds, which was the subject of the assignment, for the weekly payment. *Mathew v. Bowler*, 110

4. A bidder at a sale under a decree of the Court, who is not a party to the cause or interested in the estate which is the subject of the sale, has no right to apply to the Court to set aside a sale to another bidder, on the ground of irregularity in that the latter, although reported the purchaser, was not, in fact, the highest bidder. Whether he may apply to be declared the purchaser in the place of the bidder reported to be the best purchaser, *quere*. *Hughes v. Lipscombe*, 142

5. When the vendor's bill for specific performance is dismissed on the ground of his laches in instituting the suit, and without any decision on the question of title, the Court will not order the deposit to be returned to the purchaser, but will leave both parties to their legal remedies. *Southcomb v. The Bishop of Exeter*, 225

6. Premises were advertised to be sold according to certain printed particulars and conditions of sale. Before the sale took place, several of the printed copies were altered by the vendor's solicitor, who introduced, in writing, a reservation of a right of way to other premises belonging to the vendor. Several of the altered copies of the particulars were laid on the table in the auction room, without any remark with regard to the alteration, and an altered copy was delivered to the auctioneer, who read the same aloud before the biddings commenced; but the party who became the purchaser did not hear or notice the alteration. The contract was signed by the auctioneer (inadvertently), and by the purchaser, on a copy of the particulars of sale not containing the reservation. After the purchase money was paid and possession given, the purchaser filed his bill for a specific performance of the contract by a conveyance from the vendor, without a reservation of the right of way; and the

bill was dismissed, without costs. *Man-ser v. Back*, 443

See ORDER, 3.

SHIP, 5.

SPECIFIC PERFORMANCE, 1, 2, 3, 4, 5, 7, 8.

TITLE, 1.

STATUTE 10 & 11 VICT. c. 96.

See TRUSTS ACT.

VERDICT.

See OUTSTANDING TERM.

SETTING DOWN CAUSE, 2.

VESTED INTEREST.

See CONSTRUCTION, 1.

VOLUNTARY BOND.

See EXECUTOR, 3.

WAGES.

See SHIP, 2, 3.

WARRANT FOR TAXATION.

See COSTS, 1.

WILL.

See ANNUITY.

CONSTRUCTION, 1, 2, 9, 10, 11, 12, 14, 15, 16.

HEIR-AT-LAW.

REMOTENESS.

WITNESS.

1. On a motion, before publication, to re-examine a witness upon interrogatories which he has refused to answer, and that he may be ordered to produce a document which he has refused to produce, the witness only, and not the parties in the cause, are to be served with notice of the motion; and the rule is the same where the motion is made after publication, unless the case comes within the grounds upon which the Court guards

against the re-examination of witnesses.
Typins v Coates, 16

2. It is not an objection to such a motion that there was an irregularity in the subpoena duces tecum, or that the required document was vaguely described in the subpoena, if the witness has appeared, and submitted to be examined, and showed by his answer that he identified the document inquired after, with the document in his possession. *Ib.*

3. A subpoena duces tecum is a requisition to a witness to produce a document; and an interrogatory requiring a witness to set forth a document in the words, is in effect equivalent to a requisition to produce it. *Ib.*

4. The duty of a witness to produce a document called for by the subpoena duces tecum, or inquired after by an interrogatory, is the same whether the document is called for in order to be proved by himself or by another witness. *Ib.*

5. A witness cannot object to answer a question because it relates to private matters, or because it is immaterial, unless the answer may be withheld on some ground of privilege. *Ib.*

6. Under the statute "for improving the law of evidence," (6 and 7 Vict. c. 85,) one defendant in a suit in equity is a competent witness in the same cause on behalf of another defendant; and it is not a just exception to his evidence, that the title of the plaintiff to sustain the suit against both defendants depends upon the same issue; that fact can only be considered as affecting or tending to affect the credit of such defendant as a witness. *Wood v. Rowcliffe*, 183

7. The solicitor of the plaintiffs in the cause was served with a subpoena to attend and be examined before commissioners as a witness for the defendants, and he thereupon attended and delivered to the commissioners a written refusal to be examined, on the ground of his being professionally employed by the plaintiffs: *Held*, that such document was not properly returned by the commissioners, and

ought not to have been set down as a demurrer. *Wisden v. Wisden*, 549

8. That a witness who has attended to be examined, in pursuance of a subpoena, cannot then refuse to be examined, on the ground of irregularity in the service of the subpoena. *Ib.*

9. That it is not necessary to serve the other parties in the cause with a notice of motion that a witness be ordered to attend and be examined, though the reason assigned by the witness for his refusal to be examined was, that he was professionally concerned as solicitor for such other parties. *Ib.*

10. A witness, who had attended before the Examiner, but had refused to be examined unless he were paid the expenses of some former attendances, ordered, upon motion, to attend and be examined, and to pay the costs of the motion. *Gaunt v. Johnson*, 551

11. After an issue had been directed, (upon exceptions to the Master's report of debts in a creditor's suit,) to try the consideration of a bond, the Court refused the motion of the plaintiff, the obligee in the bond, that he might be ordered to be examined and cross-examined by the respective parties, on the trial of the issue. *Hepworth v. Heslop*, 622

12. *Quere*, whether, generally, any of the parties, not being a merely formal party, can be examined as a witness on the trial of an issue, directed at the hearing of the cause. *Ib.*

13. *Quere*, whether the Court will, after an issue has been directed, order a party to be examined as a witness on the trial of the issue, without re-hearing the matter in which the order directing the issue was made. *Ib.*

14. The Court will not make an order permitting a plaintiff in an original bill, who has subsequently become bankrupt or insolvent, to be examined as a witness in the cause for the assignees of his estate, who are prosecuting his suit by supplemental bill, *Fisher v. Fisher*, 628

See DEFENDANT.





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